TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1375.

THE UNION PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

CLARA L. BOTSFORD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED OCTOBER 11, 1890.

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1 Pleas of the circuit court of the United States for the seventh judicial circuit and district of Indiana, begun and holden at the United States court-house, in the city of Indianapolis, in said district, on the first Tuesday of May, in the year of our Lord one thousand eight hundred and ninety, before the Honorable Walter Q. Gresham, judge of said circuit court.

CLARA L. BOTTSFORD
vs.
THE UNION PACIFIC RAILWAY COMPANY. } No. 8529. Civil Action.

Be it remembered that heretofore, to wit, at the May term of said court, on the 9th day of October, 1889, before the Honorable William A. Woods, one of the judges of said court, the following proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by Claypool & Ketcham, its attorneys, and files in this court a certified transcript of the papers filed and proceedings had in the Marion superior court in the above-entitled cause, transferred to this court.

And the entry and complaint in said transcript are in the words following, to wit:

"And be it also remembered that heretofore, to wit, on the 17th day of September, A. D. 1888, the above-named plaintiff, by her attorneys, Messrs. Harris & Calkins and New & Felt, filed in the office of the clerk of said superior court her complaint against the said defendant in the words and figures following, viz:

2 The plaintiff, Clara L. Bottsford, complains of the defendant, The Union Pacific Railway Company, and says that heretofore, to wit, on and before the — day of September, 1887, the defendant was the owner and operating as a common carrier a certain line of railway commencing at Omaha, Nebraska, and terminating at Sacramento, California, passing through Ogden, in the Territory of Utah, to Sacramento, in the State of California; that on the 28th day of September, 1887, the plaintiff took passage upon the cars of said road as a passenger *en route* from the city of Indianapolis to said city of Sacramento, in the State of California, and that whilst so engaged as a passenger upon and over said defendant's road as aforesaid, at a point between Salt Lake City and the city of Ogden, without any fault or negligence whatever on her part and wholly because of the carelessness and negligence of the said defendant in the construction and care of the certain sleeping berths and the attachments employed in the operation of the same, and because of the defective and badly worn attachments by which the said berths, when not in use, were suspended and rested to the side and roof or ceiling of the cars, the plaintiff was made to suffer great and irreparable injury to her person—that is to say, that at the time and whilst so riding as a passenger over said road, at or near the point aforesaid, without any fault or negligence upon the part of the plaintiff and wholly on account of the carelessness and the negligence of the defendant as aforesaid, and whilst the plaintiff was

sitting in a "sleeper" coach being then drawn over said road, the attachment and fastening holding the upper berth immediately over the seat where she sat to its place of "non-user" gave way, and the dislodged berth and all the appliances and properties connected therewith swung loose and were precipitated with all its force
3 against the person and body of this plaintiff, striking her on the head, there and thereby bruising and wounding her and rupturing the membranes of the brain and spinal cord and causing a concussion of the same, resulting in great suffering and pain to the plaintiff in body and mind; that her injuries therefrom are permanent and become more aggravated as time advances; that she has been required to expend great sums of money in employing medical and surgical aid in treating her because of said injury, to wit, the sum of five hundred dollars ($500.00), and that she has been damaged on account thereof in the sum of ten thousand dollars ($10,000.00).

For which amount she demands judgment and all other proper relief.

HARRIS & CALKINS,
NEW & FELT,
Att'ys for Plaintiff."

And afterwards, to wit, at the November term of said circuit court of the United States for the district of Indiana, on the 5th day of February, 1890, before the Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by Claypool & Ketcham, its attorneys, and files its additional answer herein in the words following, to wit:

The defendant denies each and every allegation contained in the complaint.

CLAYPOOL & KETCHAM, *For Def't.*

And afterwards, to wit, at the May term of said court, on the 10th day of May, 1890, before the Honorable Walter Q. Gresham,
4 judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by Claypool & Ketchum, its attorneys, and files its bill of exceptions herein in the words following, to wit:

Be it remembered that on May 9, 1890, the defendant moved the court for an order against the plaintiff requiring her to submit to a surgical examination in the presence of her own surgeon and attorneys, if she desired their presence, it being proposed by the defendant that such examination should be made in manner not to expose the person of the plaintiff in any indelicate manner (the *plaintiff* at the time informing the court that such examination was necessary to enable a correct diagnosis of the case, and without such examination the defendant would be without any witnesses as to her condition). Be it further remembered that the court overruled said motion and refused to make said order upon the sole ground that this court had no legal right or power to make and enforce

such order; to which ruling and action the defendant at the time excepted and asked and obtained time to prepare a bill of exceptions containing a statement, full and sufficient, to present the point decided, the grounds of the decision, and such statement is hereinabove made, and this bill of exceptions is signed and made a part of the record herein.

W. Q. GRESHAM,
Circuit Judge.

And afterwards, to wit, at the May term of said court, on the 12th day of May, 1890, before the Honorable Walter Q. Gresham, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties—the plaintiff by A. C. Harris and
5 James A. New, her attorneys, and the defendant by Claypool & Ketcham, its attorneys—and, this cause now coming on to be tried, here comes a jury, to wit, Milton Cooper, Oliver P. Smith, James Downey, Robert N. Crooks, William Dye, John G. Sample, William C. Elliott, C. A. Power, Joseph Robinson, Louis De Vilbin, I. R. Johnson, and James A. Burnham, who, being impannelled and sworn and having partially heard the evidence herein, are by the court allowed to separate until the calling of this cause on to-morrow morning.

And afterwards, to wit, at the May term of said court, on the 13th day of May, 1890, before the Honorable Walter Q. Gresham, judge of said court, the following further proceedings in the above-entitled cause were had; to wit:

Come again the parties, by their respective attorneys, and the plaintiff now files his bill of exceptions herein in the words following, to wit:

Be it remembered that on the afternoon of May 9th, 1890, by agreement of counsel, it was ordered that the trial of this cause should not proceed until Monday, May 12th, 1890; that afterwards, on the forenoon of May 10th, 1890, the defendant presented to the plaintiff's counsel a bill of exceptions, prepared and to be thereafter presented to the court; that thereupon, and before said bill was presented to the court, and before eleven o'clock on said May 10th, the plaintiff's counsel, in open court, endorsed on said bill of exceptions as follows:

"I will consent that Mr. Claypool, defendant's counsel, may examine the plaintiff this afternoon, in the presence of Mr. New and a physician he may select.

(Signed) A. C. HARRIS.

Dated May 10th, 1890."

That thereupon the defendant's counsel handed said bill
6 of exceptions to the court, who was then occupied in hearing an argument in another case; that thereupon the plaintiff's counsel said to the court and attorney for defendant that they would

consent that the defendant might examine the plaintiff as proposed, and would produce her at Mr. New's law office, in the city of Indianapolis (which is just opposite the United States court), at two o'clock that afternoon, and asked defendant's counsel whether he desired to make the examination at that hour. He answered that he did not, as he wanted to go to the country and he did not know whether he could get his doctor. To this plaintiff's counsel replied that Dr. Hodges, his surgeon, had his office not two squares away. He said even then he had no assurance he could get the doctor at that hour. Thereupon plaintiff's counsel then and there stated they would produce their client for such examination on Monday, before the trial of the cause might begin, and asked defendant's counsel if they should do so, and he answered, "No," because at that hour he understood that the trial would begin, and he could not make an examination just on the eve of beginning of the trial. On Saturday, when the matter was up, it was expected that this trial would commence Monday morning, at the usual hour of court, 9½ a. m.

And thereupon the court announced that if defendant's counsel refused to make the examination as offered that the matter ought to be stated in any bill of exceptions. Nothing more was then and there said. And thereupon, during the afternoon of said May 10th, the judge signed the plaintiff's bill of exceptions.

And the plaintiff's counsel now, in open court, admit that on Monday morning, May 12th, 1890, the defendant's counsel,
7 Claypool & Ketcham, informed the plaintiff's counsel that they desired the opportunity of having the plaintiff examined by a surgeon in advance of the commencement of the trial and at 11 o'clock a. m.; to which request the plaintiff's counsel responded that he was willing for such examination, and would instruct his associate counsel, Mr. New, to appear at the hour named, at a convenient place designated, and notify the defendant's counsel whether the presence of the plaintiff could be procured for that purpose at the time and place mentioned. The plaintiff did not appear, however, for such examination, and the defendant's counsel were not informed that her presence could be procured—the plaintiff's counsel not being able to find her in time for such examination—there being no morning session of court on said day, but that court did convene at 2 o'clock p. m. of said day.

And the plaintiff asks that this bill of exceptions be signed by the judge of said court and be filed and ordered made a part of the record in said cause, which is now done at the time said action was had.

This May 13th, 1890.

W. Q. GRESHAM,
Circuit Judge.

And the jury heretofore impaneled and sworn herein now come also, and, having heard the residue of the evidence and the argument of counsel and charge of court herein, now return into court the verdict following:

We, the jury, find for the plaintiff, Clara L. Bottsford, *vs.* The

Union Pacific Railway Company, and assess her damages at ($10,000) ten thousand dollars.

ROBERT N. CROOKS, *Foreman.*

And thereupon the defendant, by Claypool & Ketcham, its attorneys, move the court for a new trial herein, which motion
8 is overruled by the court; to which ruling of the court the defendant now excepts, and is granted sixty days in which to file its bill of exceptions herein.

It is therefore considered by the court that the plaintiff do have and recover of the defendant, The Union Pacific Railway Company, said sum of ten thousand dollars ($10,000), together with her costs and charges in this behalf laid out and expended, taxed at $—.

And the defendant's motion for a new trial is in the words following, to wit:

The defendant moves for a new trial herein, and files the following reasons therefor:

1st. Error of the court in allowing Mrs. K. F. Phipps, witness for plaintiff, to testify as to symptoms of paralysis, and to state that the plaintiff's "symptoms were so alarming," and that the plaintiff exclaimed, "Mrs. Phipps, I think I am dying;" "Why, I am so numb," all over the objection of the defendant.

2d. Error in allowing W. H. Powell, witness for plaintiff, to testify that the car in question was not the car that he, Powell, the agent of the company, had requested for the journey, after not allowing the witness to testify that the said car was not such as had been advertised for the excursion, all over the objection of defendant. The testimony allowed was of same character as that refused, and neither should have been allowed.

3d. Error of court in allowing William H. Dye, witness for the plaintiff, to testify, over objection of defendant, as to the condition of plaintiff's health before the alleged injury, and to state that
9 "She was generally considered a very robust young woman," and that this was the opinion of the witness and persons who saw her the day before she went away, and that her physical condition was then just what it had always been, on the day before she went away; that her physical condition was then just what it — always been, on the day before she left for California, and to further testify that he saw her in April, 1888, after her return, and that she was thereafter at the house of his mother, sick and three months in bed, most of the time; and to testify that he, the witness, was very much surprised to see the change in the plaintiff, and to state that he could see that "her (plaintiff's) mind was not so good as it was when she went away, by talking with her," and that she seemed to be kind of flighty. "Talk with her awhile and she was down pretty near asleep and she would wake up like and then ask what you had been talking about—forget about everything;" and that he (the witness) did not observe anything of this kind before the plaintiff went West, and that she was counted very bright before she went West, and that she was an intelligent woman.

4th. Error of court in allowing W. H. Dye, witness for plaintiff,

to testify to complaints made by plaintiff about the way she felt and about her head and neck most of the time she was at the house of the mother of this witness six or *either* months after the alleged injury.

5th. Error in allowing each part of the testimony of this witness, W. H. Dye, in relation to the condition of plaintiff while at his house after her stay at his mother's.

6th. Error of the court in not sustaining the motion of defendant to strike out the evidence of this witness, W. H. Dye, and each part thereof.

10 7th. Error in allowing Mrs. Lucetta Dye to testify about the condition of plaintiff and her complaints about her head and neck while at the house of the witness, and about how the plaintiff looked and about her moaning and groaning and not sleeping, and about plaintiff not seeming to enjoy good health.

8th. Error in allowing this and other witnesses to testify about the condition of plaintiff's mind, how it seemed, &c.; and that there was a deficiency in her mind, and that she made expression of pain in the back of her head and neck; and the court erred in allowing the witness, Lucetta Dye, to testify that the plaintiff "said that she was just suffering from that lick she got on the head," and that "she (plaintiff) would always be worrying about that hurt she got," and "said she didn't know that she ever would get over it;" and, following this, the court erred in remarking to the attorneys for the plaintiff, in hearing of the jury, "I (the judge) think you have covered the ground with this witness."

9th. Error of the court in not sustaining the motion of defendant to strike out the testimony of Miss Ella Botsford and each part thereof.

10th. Error in allowing Dr. Warren King to testify about the literary attainments of plaintiff, and that she once showed him a draft that "she had received from a New York paper for some of her literary work." (11.)

11th. Error in allowing Dr. Franklin W. Hays, witness for plaintiff, to testify that "by dint of questioning and by an examination I (the witness) discovered that she (plaintiff) was not as clear in her mind as she was before she went to California," and that before going to California "she was regarded as having rather a

11 superior mind," over the objection of the defendant (17, 19); and the court erred in not sustaining the motion of defendant to strike out this and other testimony of this witness.

12th. Error in allowing this witness, Dr. Hayes, to testify that he had seen much of the writings of the plaintiff and knew, from that what he had seen, that she had what he, the witness, judged to be a superior capacity for literary work, and that she did editorial work on a newspaper, and that her writings was of such a character as to cause the witness to believe that she had unusual capacity intellectually, and the court erred in not sustaining the motion of plaintiff to strike out this testimony.

13th. Error in allowing the question based upon supposed facts to be asked Dr. Warren King over the objection of the defendant,

and in allowing the witness to testify that the supposed facts, assuming them true, would indicate and prove that plaintiff had concussion, &c., and also error in allowing the same question to be asked of and answered by Dr. Noble P. Howland, Jr.

14th. Error of the court in not sustaining the motion of the defendant moving this court to instruct the jury to find for the defendant, at the close of the evidence for the plaintiff.

15th. The court erred in giving each of its instructions and in giving each part thereof.

16th. The court erred in assuming and stating to the jury that certain matters or facts had been proved, and that certain facts had been admitted by defendant and some facts not controverted by defendant.

12 17th. The court erred in this, that its instructions presented more fully the issues on the side of plaintiff and less fully the issues on the side of the defendant.

18th. The damages are excessive, and for this reason a new trial should be granted.

19th. Error of court in not sustaining and allowing the motion of the defendant for an order against the plaintiff requiring her to submit to a surgical examination; which motion and the action of the court thereon is shown by a bill of exceptions hereinbefore presented by defendant, signed by the judge, and made a part of the record herein.

For each and all of foregoing reasons the defendant asks and moves for a new trial of the issues herein.

CLAYPOOL & KETCHAM,
Attorneys for the Defendant.

13 Be it further remembered that on the 30th day of June, 1890, the defendant filed its bill of exceptions embodying the evidence in this cause and the ruling of the court on questions of evidence, and also containing the instructions of the court to the jury. Among the witnesses examined was the plaintiff, Clara Botsford. Among other things, she testified as follows: That she received her injury Sept., 1887, and returned home from the West in the spring of 1888.

William H. Dye was also examined as a witness on behalf of the plaintiff, and from his testimony, as shown by the aforesaid bill of exceptions, is the following:

10 Q. Did you see her after her return, and how soon afterwards?

A. I did not see her for probably a couple weeks after she came back from the West.

11 Q. What month was it in 1888 that you saw her, if you can recollect?

A. I think it was in April.

12 Q. Where was she stopping at that time?

A. She was at my mother's then.

21 Q. You may state what, if anything else, you noticed in her appearance or conduct; describe it to the jury.

Judge CLAYPOOL: May it please the court, as to the other I will put in this objection, that the statement about how her mind seems is giving his conclusion and is not proper. He can state what she said and did, so that the jury can see whether his conclusion is correct or not.

The COURT: I will overrule that objection and will let that go to the jury. That is in the nature of a fact.

To which ruling of the court the defendant at the time excepted.

11 22 Q. Well, she complained a good deal about the way she was feeling; she complained of her head and neck, and then of course I asked her what happened, and she went on and stated to me. Of course I did not know anything about that.

23 Q. How often, if more than once, did you hear her make complaints about her head and neck hurting her?

A. Well, most of the time she was at my mother's I was up and down. I live about half a mile away from there and went up a couple of times a week.

Judge CLAYPOOL: I am objecting to all of this testimony, the court understands.

24 Q. This is at what date?

A. It is along in May and June and up in July, while she was at my mother's.

Judge CLAYPOOL: May the court please, this is nearly 9 months after the accident, and complaints made at that time are not competent evidence, and I object to it upon that ground. While a person is sick and in pain their declarations and expressions of pain alike are competent; but her own declarations 6 or 9 months, or nearly a year, afterwards are not competent evidence.

By the COURT:

25 Q. You said she was in bed part of the time?

A. Yes, sir; she was in bed right smart of the time when I was up there; she was first up and then out of the room and then in her bed.

26 Q. You say her recollection was bad?

A. Yes, sir; it was.

27 Q. That she forgot?

A. Yes, sir; she did; she was very forgetful. When we were talking about different things she would kind of drop off into a kind of sleep like.

14½ The COURT: That you want to exclude?

Judge CLAYPOOL: Most clearly, your honor, the witness may state the conversation and the details of the conversation, but not a conclusion like that; and the other ground of objection is that being sick afterwards may have resulted from another cause entirely.

It is so remotely connected with the case, I think for that reason it ought to be excluded.

The COURT: I do not know where they will go. They may endeavor to show that she remained in a disabled condition from the time of the injury up to this time.

Mr. NEW: Yes, sir; we will show it, too, even up to to-day.

Judge CLAYPOOL: I will save the question.

The COURT: Note the objection of the counsel.

15 Mrs. LUCETTA DYE, witness for plaintiff, testified, among other things, as follows:

5 Q. Do you know Clara L. Bottsford?

A. Yes, sir.

6 Q. How long have you known her?

A. Ever since she was a small, little girl.

7 Q. Has she been at your house frequently?

A. Off and on all her life, about.

8 Q. Do you recollect of hearing of her receiving an injury when she was on an excursion train?

A. Yes, sir.

9 Q. Do you remember of her going away to California?

A. Yes, sir; she left my house to go in the morning.

11 Q. When was it she went away?

A. She went away in September, I believe. It was in 1887.

12 Q. When did you next see her?

A. The next April.

13 Q. Where?

A. Why, she came to my house.

28 Q. The latter part of the time she staid at your house, how did she sleep?

A. She never enjoyed good sleep all night.

29 Q. Did you hear her moan during the latter part of the time?

A. I did, all through the night.

By the COURT:

30 Q. What proportion of the time did she keep her bed during the latter part of the time she was there?

A. Most of the time she would be able to be up and around, but I don't think there was a day but what she was in bed or lying on the bed.

16 31 Q. How much of the time?

A. A good deal of the time. I was around doing the work and I just gave her up the room and bed, and she was just up and down.

By Judge CLAYPOOL:

32 Q. As I understand you, most of the time she was up, but some of the time she was in bed?

A. Whenever she felt like lying down she laid down; she had the bed there for herself.

By Mr. NEW:

33 Q. What was the character of her conversation, as to whether it was sensible or otherwise?

A. I noticed pretty soon, right away, that she was not—that her mind was not—that she didn't talk like she did before she went away.

34 Q. Describe that to the jury.

A. I noticed right away there was some deficiency in her mind—she was too forgetful. And she was forgetful. She would just forget anything. We were talking, and she would stop and say, "What was I talking about?" And when she put down anything or have anything she could not hardly go find it again; and if she would use anything I would have to go find it for her and put it up so I could get it for her.

35 Q. Now, during the time that she was abed and out of bed, at your house, what expressions of pain, if any, did you hear her make?

A. It was all in the back of her head and neck.

36 Q. What did she say?

A. She said that she was just suffering from that lick she
17 got on the head.

37 Q. Pain where?

A. In the back of her neck, and her head was also hurting her.

38 Q. Did you hear those expressions off and on during the time?

A. No; she would be always worrying about that hurt she got; she said she didn't know that she ever would get over it.

The COURT: I think you have covered the ground with this witness, Mr. New.

39 Q. Where did she go when she left your house?

A. I am not sure; I think she went down to my son's. I am not certain; she was there awhile.

40 Q. If you doctored her any while she was at your house, what part of her body did you administer to?

A. I made drafts and poultices for the back of her head; I could not tell how many I did put on her.

41 Q. About how many?

A. I cannot tell; it was 3 or 4 times a day or night. I could not keep account.

42 Q. Drafts made of what?

A. Of everything; and put liniments on it. And her neck got in such a fix that I had to keep soft, greased rags on the back of her neck.

43 Q. Did it get raw?

A. Yes, sir; it did, and she could not lie on the back of her head and neck at all.

Mr. NEW: That is all we want to ask this witness.

Judge CLAYPOOL: Now, may the court please, I object to
18 the testimony of this witness upon the ground that she is not an expert, and that she cannot give an opinion as to the con-

dition of health and mind of the plaintiff without first giving the facts upon which these statements are based. I object further to all, and each part of her testimony, upon the ground that it is irrelevant and immaterial, and upon the further ground that it is too remote from the time when the injury under investigation was received.

The court overruled the objection; to which ruling the defendant at the time excepted.

Be it further remembered that upon the conclusion of the argument of counsel the court instructed the jury as follows:

GENTLEMEN OF THE JURY: The plaintiff was a passenger on one of the defendant's trains; she had paid for her passage. While the plaintiff was occupying a berth in a sleeping car, the train in motion, the upper berth, the one immediately over the plaintiff, fell, striking her head. Witnesses testified that the attachment or device which held the berth in position when shoved up and not in use *were* loose or defective—so loose as not to securely hold the berth in position. This evidence was not disputed by the defendant, and it is not claimed that when the berth fell the plaintiff was where she had no right to be, or that by her own negligence she contributed to her injury. The defendant was bound to exercise the utmost caution in providing for the security and safety of the plaintiff and its other passengers, and to transport the plaintiff in cars adequate for the plaintiff's security; and if you believe from the evidence that the berth which fell upon the plaintiff's head was weak or defective in construction, or, if properly constructed originally, that it had been allowed to get out of repair, and in consequence thereof fell and injured the plaintiff when she was quietly in her seat, the defendant is liable in damages for the injuries she sustained.

19

If the plaintiff is entitled to recover, it is for the jury to say what amount will fairly compensate her for lost time, health, strength, and pain suffered, if there has been such loss and suffering; also for any outlay she has made for medicines, medical attention, and nursing. There was evidence before you as to the plaintiff's occupation or employment before her injury. In determining what her time was worth you are at liberty to consider what she was capable of earning.

You will not assess punitive damages, or smart money, against the defendant. Your assessments will be limited to an amount that will fairly compensate the plaintiff, as already stated.

You heard the physicians and others who spoke of the character and the extent of the plaintiff's injuries, the pain she has endured and may continue to endure; you alone are authorized to determine from the evidence to what extent the plaintiff was injured, and to what extent she has suffered and may yet suffer. In the discharge of your duty, which is a serious one, you will no doubt fairly weigh the evidence and assess the damages.

The sole question before you, if you find that the plaintiff is en-

titled to recover, is what sum will fairly compensate her for her injuries. Your verdict should be your deliberate judgment, uninfluenced by prejudice.

My attention has been called to the fact that the counsel for plaintiff read and commented upon an answer in the case
20 which was not introduced in evidence before the jury. If the plaintiff desired that that answer should be considered by the jury it should have been read as part of the evidence before the plaintiff rested. I therefore say to you that that answer was not in evidence and you will not consider it or the comments of counsel upon it.

You are not authorized to go beyond the amount demanded in the declaration, $10,000. If you find for the plaintiff, the form of your verdict will be:

"We, the jury, find for the plaintiff and assess her damages at ——."

(Any sum not exceeding $10,000.)

If you find for the defendant, the form of your verdict should be: "We, the jury, find for the defendant."

To the giving of each and all of said instructions by the court the defendant then and there excepted.

The defendant asks that the foregoing bill of exceptions, counting all the evidence adduced on the trial of said cause, and also the instructions of the court to the jury, be signed and made a part of the record herein, which is now done accordingly this 27th day of June, 1890.

WALTER Q. GRESHAM,
Circuit Judge. [SEAL.]

21 And afterwards, to wit, at the May term of said court, on the 4th day of October, 1890, before Honorable William A. Woods, judge as aforesaid of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by their attorneys aforesaid, and the defendant offers the following bond, being a bond executed by the Union Pacific Railway Company, and attested by Alexander Miller, secretary of said company, and also executed by the Guarantee Company of North America, being a bond for fifteen thousand dollars ($15,000), conditioned as follows:

"Whereas the above-named Union Pacific Railway Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse a judgment at law rendered in the above-entitled suit by the circuit court of the United States for the district of Indiana: Now, therefore, the condition of this obligation is that if the above-named Union Pacific Railway Company shall prosecute its said writ of error to effect and answer all costs and damages that may be adjudged or awarded against it if *he* shall fail to make good *his* plea, then this obligation to be void; otherwise in full force."

And by agreement of parties said bond is to be approved by Judge

Woods, now presiding as circuit court judge, as a cost bond only; and it is agreed that the defendant shall take out his writ of error and make returns thereto by the first Monday in October, 1890, and also submit to Justice Harlan said bond, and if said bond is approved by him as being good and sufficient bond to secure the payment of the judgment if it be affirmed against the defendant, then the said Harlan is to approve it as a supersedeas bond. It is further agreed, in consideration of the premises aforesaid, that this
22 case shall be submitted for decision under rule twenty (20) of the Supreme Court of the United States.

And said bond is now approved by the court in accordance with the agreement of parties as aforesaid.

And said bond is in the words following, to wit:

Know all men by these presents that we, The Union Pacific Railway Company and The Guarantee Company of North America, are held and firmly bound unto the above-named Clara L. Bottsford in the sum of fifteen thousand dollars, to be paid to said Clara L. Bottsford; to which payment, well and truly to be made, we bind ourselves, jointly and severally, and our and each of our heirs, executors, and administrators, jointly by these presents.

Sealed with our seals and dated this ninth day of September, 1890.

THE UNION PACIFIC RAILWAY COMPANY,
By CHARLES F. ADAMS, *President.*

Attest: ALEX. MILLAR, *Secretary.*

Whereas the above-named Union Pacific Railway Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the (a) judgment at law rendered in the above-entitled suit by the circuit court of the United States for the district of Indiana: Now, therefore, the condition of this obligation is that if the above-named Union Pacific Railway Company shall prosecute its said writ of error to effect and answer all costs and damages that may be adjudged or awarded against it if *he* shall fail to make good *his*
23 plea, then this obligation to be void; otherwise in full force.

THE UNION PACIFIC RAILWAY COMPANY,
By C. F. ADAMS, *President.* [SEAL.]

Attest: ALEX. MILLAR, *Secretary.* [SEAL.]

THE GUARANTEE COMPANY OF NORTH AMERICA,
By C. HAMLIN, JR.,
Vice-President & Managing Director. [SEAL.]

ROBERT KERR,
Act'g, Secretary.

Sealed in presence of—

JOHN F. DILLON.

Taken and approved by me this 4th day of October, 1890, as a cost bond.

WM. A. WOODS,
U. S. Judge.

24 UNITED STATES OF AMERICA, } ss:
District of Indiana, }

I, Noble C. Butler, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full, true, and complete copy of the complaint and answer, of general denial, orders of the court showing trial of the cause, and the verdict of the jury and the judgment of the court thereon, motion and reasons for a new trial, defendant's and plaintiff's bills of exceptions on motion, and action of court requiring the plaintiff to submit to medical examination; and I do further certify that the extracts from the evidence and from the ruling and action of the court touching evidence, as copied and shown in the foregoing transcript, are true and correct extracts or quotations from the bill of exceptions filed June 30th, 1890, embodying the evidence and rulings of the court on questions of evidence, and embodying the instructions of the court to the jury mentioned in the foregoing record, and that the instructions shown in said transcript *is* a correct and true copy of the instructions of the court to the jury, as shown by the last-mentioned bill of exceptions.

Seal Circuit Court of the United States, District of Indiana.

Witness my hand and the seal of said court, at Indianapolis, in said district, this 7th day of October, A. D. 1890.

NOBLE C. BUTLER, *Clerk.*

25 UNITED STATES OF AMERICA:

The President of the United States of America to Hon. William A. Woods, one of the judges of the circuit court of the United States for the district of Indiana, Greeting:

Because on the record and proceedings as also on the rendition of a judgment of a plea which is in the said circuit court, before you, between Clara L. Botsford and The Union Pacific Railway Company, a manifest error hath happened, to the great damage of the said The Union Pacific Railway Company, as by *his* complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October inst., in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Seal Circuit Court of the United States, District of Indiana.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court this 4th day of October, A. D. 1890.

NOBLE C. BUTLER, *Clerk.*

26 United States of America to Clara L. Botsford, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October inst., pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Indiana, wherein The Union Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Circuit Court of the United States, District of Indiana.

Witness the Honorable William A. Woods, judge of the district court of the United States for the district of Indiana and *ex officio* judge of said circuit court, this 4th day of October, in the year of our Lord one thousand eight hundred and ninety.

WM. A. WOODS.

26½ Service acknowledged this October 4, 1890.

ADDISON C. HARRIS,
Att'y for Clara L. Botsford.

Indianapolis.

27 In the Supreme Court of the United States. October Term, 1890.

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
CLARA BOTTSFORD, Defendant in Error.

Comes now the said plaintiff in error, by his attorneys, Solomon Claypool and William A. Ketcham, and says that in the record proceedings of the court aforesaid there are many manifest errors, as follows, to wit:

First. The error in the court's not sustaining and allowing the defendant's motion for an order against the plaintiff requiring her to submit to a surgical examination in the presence of her own surgeon and attorneys, if she desired their presence, the court being informed that such examination was asked for the purpose of obtaining information about the condition of the plaintiff, and that without such examination the defendant would be without any witness as to her condition; which motion was not allowed upon

the sole ground, as ruled by the court, that the "court had no right or power to make and enforce such order;" to which ruling the defendant at the time excepted.

Second. There was error in each and every part of the instructions of the court to the jury, and more particularly as follows:

28 *a.* For that the court assumed and stated facts as proven which should have been submitted to the jury for their finding.

b. For that the court, after stating what witness had testified, added: "This evidence was not disputed by defendant, and it is not claimed that when the berth fell the plaintiff was where she had no right to be or that by her own negligence she contributed to her injury."

c. For that the court assumed and stated to the jury that the plaintiff was injured by the falling of a berth on her head and while she "was quietly in her seat."

d. For that the general terms of the instructions of the court *was* such as to impress the jury that, in the opinion of the court, the plaintiff ought to recover and that the plaintiff had been greatly damaged, without admonishing the jury that they were the exclusive judges of the evidence.

Third. Error in allowing William H. Dye, witness for plaintiff, to state and describe the appearance of the plaintiff at a time more than six months after the time of the alleged injury, and to state conclusion about the condition of the mind of the plaintiff without first giving a statement of facts upon which such conclusion was based, and holding that such statements *was* in the nature of a fact.

Fourth. Error in allowing said witness, William H. Dye, to testify about complaints which plaintiff made about her condition and about the condition of her head and neck, and that she was making complaints most of the time plaintiff was at the house of the mother of the witness, which was during a period more than nine months after the alleged injury.

29 Fifth. Error in allowing Mrs. Lucetta Dye to testify and state the character of the conversation of the plaintiff, and that the plaintiff did not talk as she did before, the witness not stating the conversation of plaintiff; and error in allowing this witness, more than six months after the alleged injury, to describe the condition of the plaintiff and to testify that plaintiff complained of her head and neck and said "she was just suffering from that lick she got on the head," and that plaintiff "was always worrying about that hurt she had got," and said "she didn't know that she would ever get over it;" and in this court, in this connection, remarking to the attorney of the plaintiff, "I think you have covered the ground with this witness."

Sixth. Error in allowing each and every part of the testimony of William H. Dye and of Lucetta Dye, as shown in the foregoing record.

All and each of the foregoing errors appear in the foregoing record and proceedings of the court.

Wherefore the plaintiff prays that the judgment of the court below be in all things reversed.

SOLOMON CLAYPOOL,
WILLIAM A. KETCHAM,
Attorneys for Plaintiff in Error.

Endorsed on cover: Indiana C. C. U. S. No. 1375. The Union Pacific Railway Company, plaintiff in error, *vs.* Clara L. Botsford. Filed October 11, 1890.

In the Circuit Court of the United States for the District of Indiana.

CLARA L. BOTTSFORD
vs.
THE UNION PACIFIC RAILWAY COMPANY. } No. 8529. Civil Action.

Be it remembered that among the records of proceedings had, papers filed, motions decided, rulings made, exceptions noted, judgments rendered, decrees entered, &c., in the superior court of the county of Marion, State of Indiana, are the following in the cause of Clara L. Bottsford *vs.* The Union Pacific Railway Company, No. 38566:

* * * * * * *

And afterwards, to wit, on the 7th day of May, 1889, that being the 2nd judicial day of the special term of said superior court for the month of May, 1889, before the Honorable Napoleon B. Taylor, judge presiding in room (1) one, the following proceedings were had herein:

* * * * * * *

And the defendant now files its petition asking that this cause be transferred to the United States circuit court for the district of Indiana, and presents with said petition a bond as required by law. Said petition and said bond are in the words and figures following, viz:

STATE OF INDIANA, } ss:
Marion County. }

CLARA L. BOTTSFORD
vs.
THE UNION PACIFIC RAILWAY COMPANY. } No. 38566. Superior Court. Petition to Remove to U. S. Cir. Court.

Your petitioner respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled cause exceeds, exclusive of costs, the sum of two thousand dollars ($2,000.00); that the controversy in said suit is between citizens of different States, and that the petitioner was at the time of the commencement of this suit and still is a citizen of the State of Indiana, and that the defendant, The Union Pacific Railway Company, was then and still is a citizen of the State of Massachusetts.

Your petitioner, the defendant herein, offers herewith a bond, with good and sufficient security, for entering in the circuit court of the United States for the district of Indiana; on the first day of its next session, a copy of the record of this suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

Wherefore said defendant prays the court that said bond be accepted and approved; that this cause be removed for trial to the

said circuit court of the United States for the district of Indiana, and that no further proceedings be had therein in this court.

THE UNION PACIFIC RAILWAY CO.,
By CLAYPOOL & KETCHAM, *Att'ys.*

STATE OF INDIANA, *Marion County,* } ss:

Solomon Claypool on his oath states that he has read over the foregoing petition and knows the contents thereof, and that the same is true, as he is informed and believes.

SOLOMON CLAYPOOL.

Subscribed and sworn to this 2nd day of October, 1888.
[SEAL.] BERTHA WILLIAMS,
Notary Public.

CLARA L. BOTTSFORD
vs.
THE UNION PACIFIC RAILWAY COMPANY. } No. 38566. Superior Court. Bond.

Know all men by these presents that The Union Pacific Railway Company, as principal, and Solomon Claypool and William A. Ketcham, of the State of Indiana and county of Marion, as sureties, are held and firmly bound unto Clara L. Bottsford in the penal sum of five hundred dollars ($500.00), lawful money of the United States; for the payment of which we bind ourselves, jointly and severally, firmly by these presents.

The condition of this obligation is such that if the said Union Pacific Railway Company shall enter and file in the next circuit court of the United States in and for the district of Indiana, on the first day of the session, copy of all process, pleadings, depositions, testimony, or other proceedings concerning or affecting the petitioner in a certain suit now pending in the Marion superior court of the county of Marion, in which the said Clara L. Bottsford is plaintiff and the said Union Pacific Railway Company is defendant—suit being as above entitled—and shall do such other acts as are required by law to be done upon the removal of said suit from the State court to said United States court, then this obligation to be void; otherwise to remain in full force.

THE UNION PACIFIC RAILWAY COMPANY,
By CLAYPOOL & KETCHAM, *Its Att'ys.*
SOLOMON CLAYPOOL.
WILLIAM A. KETCHAM.

And the court finding that said petition and said bond were filed within the time prescribed by the statute, and that the defendant is a citizen of the State of Massachusetts, and that the plaintiff is a citizen of the State of Indiana, and that the said bond has been filed as required by statute, and that the petitioner, the said defendant, is entitled to removal of this cause to the United States circuit court for the district of Indiana, said petition (being duly verified) and said bond are now accepted.

And it is therefore ordered by the court that this suit be removed for trial in the next circuit court of the United States for the district of Indiana, pursuant to the statute of the United States, and all further proceedings in this cause are hereby stayed.

To which ruling of the court the plaintiff at the time objects and excepts.

NAPOLEON B. TAYLOR, *Judge.*

UNITED STATES OF AMERICA, *District of Indiana,* } ss:

I, Noble C. Butler, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full, true, and complete copy of the petition for removal to the United States court and of the bond for removal and of the order of court on said petition and bond, as fully as the same appears of record in the certified transcript from the superior court of Marion county, State of Indiana, in the cause of Clara L. Bottsford *vs.* The Union Pacific Railway Company, filed in said circuit court of the United States for the district of Indiana, and as fully as the same appears of record and remains on file in my office.

Seal of Circuit Court of the United States, District of Indiana.

Witness my hand and the seal of said circuit court, at Indianapolis, in said district, this 27th day of December, A. D. 1890.

NOBLE C. BUTLER, *Clerk.*

Supreme Court of the United States. October Term, 1890.

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error, *vs.* CLARA L. BOTSFORD. } No. 1375.

The defendant in error hereby waives the issuing of a certiorari for the purpose of having the foregoing brought in and made a part of the record, and it is now agreed between the parties that the foregoing certified transcript may be filed and treated as a part of and as if contained in the return to the writ of error herein and in all respects taken and treated as a part of the record in the above-entitled cause.

SOLOMON CLAYPOOL,
For Plaintiff in Error.
JAMES A. NEW,
ADDISON C. HARRIS,
Att'ys for Def't in Error.

Indianapolis, Dec. 29, 1890.

[Endorsed:] Sup. Court U. S., 1890, Oct'r term. No. 1375. The Union Pacific Railway Co., pl'ff in error, *vs.* Clara L. Botsford. Stipulation and addition to record.

[Stamped:] Office Supreme Court U. S. Filed Dec. 31, 1890. James H. McKenney, clerk. $1.35.

Office Supreme Court U. S.
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1375.

THE UNION PACIFIC RAILWAY COMPANY,

Plaintiff in Error,

vs.

CLARA L. BOTSFORD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN F. DILLON,
HARRY HUBBARD,
For the Plaintiff in Error.

C. G. Burgoyne, 146-150 Centre Street, N. Y.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

THE UNION PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

CLARA L. BOTSFORD.

No. 1375.
Brief for Plaintiff in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

Statement of the Case.

This action was begun by the defendant in error, who was the plaintiff below, in the Marion Superior Court in Indiana, and the cause was removed to the Circuit Court of the United States for the District of Indiana (Record, p. 1). The action was brought by the plaintiff, Clara L. Botsford, a passenger, against the defendant Railway Company, for an alleged personal injury to plaintiff caused by an upper berth in a sleeping-car on defendant's railway in the Territory of Utah giving way and falling upon the head of plaintiff, who was sitting under the berth. The plaintiff alleged negligence in the construction and care of the berth (Complaint, Record, p. 1). The answer was a general

See also Additional Transcript of Record.

denial (Record, p. 2). The case was tried before a jury May 12, 1890 (Record, p. 3), who returned a verdict for the plaintiff for $10,000 (Record, p. 4) (the full amount demanded), for which amount, with costs, judgment was rendered (Record, p. 5). The defendant Railway Company sued out a writ of error to the Circuit Court, bringing the case into this Court (Record, p. 14).

The Record contains two bills of exceptions by the Railway Company.

The first bill of exceptions is as follows (Record, p. 2):

"Be it remembered that on May 9, 1890, the defendant moved the Court for an order against the plaintiff requiring her to submit to a surgical examination in the presence of her own surgeon and attorneys, if she desired their presence, it being proposed by the defendant that such examination should be made in manner not to expose the person of the plaintiff in any indelicate manner (the plaintiff [defendant] at the time informing the Court that such examination was necessary to enable a correct diagnosis of the case, and without such examination the defendant would be without any witnesses as to her condition). Be it further remembered that the Court overruled said motion, and refused to make said order upon the sole ground that this Court had no legal right or power to make and enforce such order; to which ruling and action the defendant at the time excepted, &c."

The bill of exceptions then states that the want of power is "the ground of the decision" (p. 3).

The second bill of exceptions is (Record, pp. 7–13):

(*a*) To the rulings of the Court upon the admission of evidence, and (*b*) to the instructions to the jury.

Assignment of Errors.

The Court erred in refusing to grant the order applied for by defendant, as stated in the defendant's first Bill of Exceptions (*Supra*, p. 2; Record, p. 2).

ARGUMENT.

I.

The Court erred in refusing to grant the order applied for by defendant for the surgical examination of plaintiff.

This action was brought by the plaintiff, Clara L. Botsford, to recover damages for an alleged injury to her person, caused by a berth in a sleeping-car giving way and falling upon her head. The alleged injuries were (Complaint, Record, p. 2):

> "The bruising and wounding her and rupturing the membranes of the brain and spinal cord and causing a concussion of the same, resulting in great suffering and pain to the plaintiff in body and mind; that her injuries therefrom are permanent and become more aggravated as time advances," &c.

The complaint thus alleged an injury to the person of the plaintiff of such a kind as could not be perceived by the ordinary observer, but such as would lie only within the knowledge of physicians and surgeons, who, by virtue of their special training and profession, are acquainted with such matters. The complaint also alleged that such injury was *permanent* in its nature—a fact clearly not within the knowledge of the ordinary person or even of the plaintiff herself. She could

know only her feelings and symptoms. The *causes* of those symptoms and the *permanency* of these causes could be known only to the medical profession.

The large recovery was based upon the alleged permanent nature of an internal, invisible and hidden injury. The Court's charge told the jury that the recovery might include damages for what the plaintiff "has suffered *and may yet suffer*" (Record, p. 11).

Though the accident by which the plaintiff received her alleged injury occurred in September, 1887, yet the plaintiff did not bring this action until September, 1888—about one year after the accident. Meanwhile, and within the first six months after the accident, the plaintiff was well enough to travel from the place of the accident in Utah to California, and back again to Indiana. The action was brought in a court nearly 2,000 miles from the place of the accident, and from defendant's witnesses. No local physician seems to have been employed in Utah or in the West. The plaintiff was among her relatives and friends and the case was to be tried before a jury from the State of plaintiff's home. It was expected that these relatives and friends would testify, and they did testify with great zeal in plaintiff's favor. The kind of evidence which such interested witnesses would be likely to give is well illustrated by the testimony which appears in the bill of exceptions (Record, p. 7–10). These witnesses were allowed to testify freely as to the plaintiff's condition. One lay witness even testified as to how she "doctored" the plaintiff (Record, p. 10). This "doctoring" consisted chiefly of poultices and "drafts" (made "of everything"), and put upon the back of the plaintiff's neck until it became raw. From all

indications the plaintiff must have suffered quite as much from such "doctoring" as from the accident. It was easy to predict before the trial that just this sort of evidence would be introduced, and that, unless there could be some reliable evidence as to the real condition of plaintiff, and the *causes* of her condition, and the truth as to the alleged *permanency* of her injuries, the defendant would be at the mercy of interested and ignorant witnesses, before a jury composed of men from the State of plaintiff's home.

Under these circumstances the defendant applied to the Court for a surgical examination of plaintiff, in order to have evidence (indeed the only reliable evidence) as to the real character and permanency of the alleged injury. The defendant's counsel, at the time of this application, stated professionally to the Court that without such examination it would be without any witnesses as to plaintiff's alleged condition (Record, p. 2.) And such was the fact; and the Court's refusal left the defendant utterly helpless. It turned the defendant over to the mercy of the plaintiff, who was a witness in her own behalf, testifying or offering testimony as to symptoms easily fabricated or simulated, and to her chosen experts. It is inconceivable that the learned and estimable Judge who presided at the trial would have done this, unless he had erroneously supposed he had no power to do otherwise. Hence, the fairness with which he states in the bill of exceptions, in a distinct and separate clause, "the grounds of his decision," viz.:

"That the Court overruled the said motion and refused to make the said order upon the *sole ground* that this Court had no right or power to make or enforce such order."

This was meant to and does exclude the notion that the showing for the order was not sufficient, or that it was denied on its merits, or that the circumstances were such as did not entitle the defendant to call for such an examination. The Court's ruling was based alone upon the grounds of want of power, and this—the question of power—presents the only question here upon this record. Some of the cases below cited speak of a *discretion* in the Court to grant or refuse an order of this character. Such a proposition cannot be affirmed broadly and generally. There may be cases where such an examination is so unnecessary that the Court on the trial might refuse to make such an order, just as it may refuse to receive merely cumulative evidence, or as it may refuse to make any other order that is clearly not requisite to the ends of justice. It is only in this qualified and limited sense that the right to such an examination rests in the discretion of the Court, and in this restricted sense only have the Courts held it to be discretionary. Indeed, a *right* which rests absolutely in the discretion of a Judge is a solecism—it is no right at all.

If the power to order such examination can in any fair sense be said to rest in the *discretion* of the Court it is a legal discretion, to be exercised, not arbitrarily, but in the interests of justice.

This, however, is a subject not presented by the record in this case, for the reason that it appears affirmatively that the Court refused the order, not because it was not under the circumstances a proper order to make, but *solely* upon the mistaken notion that it had no power to make it. We repeat that this is expressly noted in the bill of exceptions to be the "ground

of the decision," thereby expressly excluding all other grounds. It is the "*sole ground*" of the Court's refusal. And the Court, by stating that a want of power was the "*sole* ground of decision" (see bill of exceptions, pp. 2, 3), in effect decided that the case was a proper one for such an examination, since its *only* ground of decision was the want of power to make such an order in any case. There is, therefore, no question in this case as to the exercise or non-exercise of any discretion on the part of the Court.

The examination which was proposed (Record, p. 2), and which the nature of the alleged injury and its alleged permanency required, was not open to any objection on the ground of propriety. The precautions proposed were amply sufficient to prevent any abuse of the order. There was nothing in the proposed examination of the head and spinal cord to shock or offend the modesty of the most refined woman.

The defendant's statements and showing as to the necessity for the examination was not controverted by the plaintiff, and no counter showing was made by her. And the "Court refused the order upon the *sole* ground that it had no right or power to make it" (Record, p. 2). In this the Court clearly erred, as the rule of law is well established that in such a case the defendant has a right to such order, and the refusal to grant it is error.

This rule rests upon the soundest legal reason, namely, the *necessity of such examination in order to ascertain the facts as to the character, extent and permanency of the alleged injury*, and upon the inherent right and power of the Court to compel a plaintiff, who

invokes its jurisdiction and asks its judgment, to furnish the Court with the best (and, as in the present case, the only reliable) evidence of the alleged facts upon which the plaintiff bases his demand.

It needs no argument to show that in a case like the present one, in which the complaint alleged a personal injury of a kind which would not appear to ordinary observation, and in addition alleged that such injury was permanent in its character,—it needs no argument to show that in such a case a surgical examination is the only means of ascertaining the truth of such allegations.

There is another good, aye, necessary, reason for the rule. The plaintiff himself, though a party to the action, may testify as a witness. "All questions of evidence," says ABBOTT, C. J., in *Doe ex. Pettell*, 5 B. and Ald., 224, "must be considered with reference to the particular circumstance under which it is offered." Lord MANSFIELD remarked in one case: "We do not sit here and take the rules of evidence from *Keble* or from *Siderfin*." The great revolution made in the law by the removal of the bar of pecuniary interest and by the admission of parties to testify, necessarily affect the questions concerning evidence. By the common law rule, as is well known, a party, because of his interest in the event of the action, and his supposed prejudice in his own favor, was not permitted to testify. This rule has been changed, so that now in almost all cases a party may testify as a witness in his own favor. This is the rule in the United States Courts, as enacted by statute (Rev. Stat., § 858). In the present case the plaintiff did so testify (Record, p. 7). Since it is the rule that

the plaintiff may thus testify in his own favor, and since it frequently happens (as in the present case) that the personal injury for which the plaintiff brings his action is of such a character as to be hidden from the observation and knowledge of ordinary persons, if it were not for the fact that the Court has the right and power to order a surgical examination in such a case, then defendants would be at the mercy of unscrupulous plaintiffs who would not hesitate to testify to any and all kinds of fictitious pains and sufferings in order to get a verdict in their favor. Experience has shown that cases of personal injury are frequently simulated; that plaintiffs, even in cases of slight accidents, pretend to have very great pains and sufferings which they either do not have at all, or which are produced by entirely different causes. The only remedy for this sort of evil, indeed the only means of insuring that this sort of fraud will not be practised, is to cause the plaintiff to submit to a proper surgical examination in order to ascertain the truth as to the alleged injury. Such an examination is absolutely necessary in order to protect a defendant, and in order to prevent the Court from becoming the willing or passive instrument of injustice. Such an examination can do the plaintiff no harm; on the contrary, if he has a good cause of action, it will aid him to obtain his just dues.

IT IS NO ANSWER to say to the defendant "you may cross-examine the plaintiff's medical expert or experts." Why should a party against whom enormous damages are demanded on account of hidden injuries, claimed to be permanent, be limited to such witnesses as the

plaintiff may select. She puts the extent of her injury in issue. In this case, under the course of the trial below, the investigation of the real issue—the existence, extent and permanency of the plaintiff's alleged injury—was really *ex parte*. In such a case she was bound to submit, under reasonable circumstances, to an examination by an expert selected by the defendant just as much as she would be bound to disclose and produce books and papers on an issue in which these would be material and relevant. The Court could order her to unlock a safe and produce any document, book or paper that might be in her possession material to the case. What shortens its arm in a case where she alleges internal injuries which she says are permanent, and of which only medical experts are competent to judge?

It is never in the interest of truth to confine the examination within the lines proposed by the pecuniary interest of one of the parties. Here the offer was that the proposed examination "should be in the presence of the plaintiff's own surgeon and attorneys." Could anything be fairer? Was not such a course in the interests of justice? If such an examination had been made and the medical expert had testified, would not additional light be thrown upon the real issue—the existence, extent and permanent nature of the plaintiff's alleged injury? If the result had been coincident with that reached by the plaintiff's experts the truth would have been satisfactorily attained. If not thus coincident the jury would have had the conflicting data and it would have been its province to have determined where the truth lay. This would then have been a real trial a free and open contest—and not (as was the effect of the Court's ruling which we are here question-

ing) a mere *inquest of damages* upon the testimony of the plaintiff and her chosen experts.*

THE RULE IS WELL SETTLED BY THE AUTHORITIES that the trial Court has the right and power to order a physicial or surgical examination of the plaintiff in a proper case, and that a refusal of the Court to make such order is error. The authorities, with the exception of those of New York, where the question has not yet been passed upon by the Court of Appeals, and where the lower Courts differ, and perhaps also of Illinois, where the question is apparently treated as still an open one (see *infra*), are unanimous in support of this proposition.

A CASE DIRECTLY IN POINT IS *Schrader vs. C., R. I. & P. R. R. Co.*, 47 Iowa, 375 (1877). The action was to recover for personal injuries sustained by plaintiff, while in the employment of defendant, by reason of the negligence of defendant's employees. There was a verdict and judgment for plaintiff; defendant appealed. The facts are stated by the Court as follows:

(P. 376.) "After the jury were impaneled, and before the introduction of any testimony, the defendant filed a written application asking that a proper order of the Court be made, requiring the plaintiff to submit to an examination by physicians and surgeons, that they might determine the true condition of his health and

* We may be pardoned, we trust, in recalling Milton's noble passage in his plea for Unlicensed Printing:

"Let Truth and Falsehood grapple: who ever knew truth to be put to the worse in a free and open encounter? What collusion is this, whereas we are exhorted by the wise man to use diligence, 'to seek for wisdom as for hidden treasures,' early and late, that another order shall enjoin us, *to know nothing but by statute?* For who knows not that truth is strong, next to the Almighty: she needs no policies, nor strategems, nor licensings to make her victorious: those are the shifts and defenses that error uses against her power."

the character and extent of his ailments, to the end that it might be known whether, indeed, he was suffering from any disability, and; if so found, whether it originated from the injuries sustained by the timbers falling upon him, as claimed by him in his petition and testimony, &c." [This application was refused.]

(P. 378.) "Upon the cross-examination, after having stated the condition of his legs, he (the plaintiff) was asked if he was willing to permit his limbs to be examined by physicians. His counsel objected to this question, and the Court did not permit it to be propounded to him."

(P. 378.) "The first ruling of the Court" [upon the application for an order of examination by physicians and surgeons] "is based upon the ground that it possessed no authority to order the examination, as a matter of right possessed by defendant. We are to understand that the like reason controlled the decision upon the competency of the question objected to by defendant. It seems quite clear that, if the defendant had no right to require plaintiff to submit to an examination of his person, the Court rightly decided in overruling defendant's application. The same is true as to the ruling upon the interrogatory."

The Supreme Court reversed the judgment of the trial Court for the sole reason that the trial Court erred in refusing to make an order for the physical examination of plaintiff, the trial Court having *refused such order upon the ground that it had no authority to make it*, just as the order was refused in the present case.

After stating that suitors are entitled to demand that the whole truth be presented to the jury, in order that justice may be properly administered, and mentioning, as a step showing progress in this direction, the abrogation of the rule which precluded parties to actions from giving their testimony therein, the Court says (p. 380):

"He (plaintiff) claims in his pleadings, and so testi-

fied on the former trial, that the injuries produced permanent disability. * * * To our minds the proposition is plain that a proper examination by learned and skillful physicians and surgeons would have opened a road by which the cause could have been conducted nearer to exact justice than in any other way. The plaintiff, as it were, had under his own control testimony which would have revealed the truth more clearly than any other that could have been introduced. The cause of truth, the right administration of the law, demand that he should have produced it."

The Court also shows (p. 381) that there is inherent ample power in a trial Court to make and enforce obedience to such an order.

No statute of the State on or relating to the subject existed, and the decision above, as well as all those referred to below, proceeded upon the general principles of law.

Another case directly in point is *White v. Ry. Co.*, 61 Wis., 536 (1884), which was an action for personal injuries. Plaintiff was a woman. The defendant moved for an examination of the plaintiff's person by competent physicians, and the application was refused. The Supreme Court for this reason reversed the judgment, and remanded the cause for a new trial. The Supreme Court states the case as follows (p. 539):

"The testimony of the plaintiff and some of her witnesses tends to show that at the time of the trial she had not recovered from the effect of the injuries, that her limb was not then in a normal condition; and that the effect of such injuries would or might be permanent. She testified that five physicians had examined her limb, among whom was Dr. Hare. During the trial counsel for the defendant made the following request, and the following proceedings were thereupon had: 'DEFENDANT'S COUNSEL: We ask of the Court to direct the plaintiff, who is now present, to submit her

limb for examination in a private room attached to the court-room, privately, to Drs. Senn and Hare, who are now present, and that if she wish she can be accompanied by any of her own female friends who are present, or any other physician whom she chooses. COURT: I do not see anything improper in the request, but I do not think that I have any authority to compel a suitor to submit, in a case of this kind, to any examination against his or her will; I therefore refuse the application. Defendant excepts. Plaintiff's counsel says: 'The plaintiff herself declines to have the examination in the absence of her physician who, as her attorney is informed and believes, has left the city since he has been on the witness stand.'"

"It will be seen that the Court denied this request on the sole ground that he had no authority to compel the plaintiff to an examination against her will. On principle and authority we are satisfied this was error. The then condition of the injured limb had a most important bearing upon the question as to whether the plaintiff's injuries were permanent, and an examination at that time, the results of which would have been put in evidence before the jury, would in all probability have greatly aided them in determining the extent and consequences of the injury. It would be or might have been more satisfactory and conclusive evidence on that subject than the statements of the plaintiff or the opinions of medical witnesses. The application for her examination contained in it every reasonable safeguard against offending the modesty or delicacy of the plaintiff, and although she might shrink from the examination, yet the ends of justice imperatively demanded that she submit to it. Such examinations are frequently ordered by Courts in cases of divorce for impotency and in cases of alleged pregnancy, and the authority of the Court to order them has never been questioned so far as we are advised."*

* In cases for divorce for alleged impotency it is the regular practice to order an inspection of the person to ascertain the fact. This is done on the ground of necessity: the same necessity exists in a case like the present one.

See 2 Bishop on Marriage and Divorce, § 590 *et seq.*
Decenbagh vs. Decenbagh, 5 Paige, 554.
Newell vs. Newell, 9 Paige, 25, 26.
Le Barron vs. Le Barron, 35 Vt., 365.

"It is said by the learned counsel for the plaintiff that it rests in the sound discretion of the Court to order or refuse an examination. Perhaps it does. But that discretion has not been exercised here. The Court expressly denied the application, because of alleged want of power to grant it. We hold that in a proper case the Court has power to order an examination, and that this is a proper case in which to exercise it."

Still another case directly in point is *Richmond and Danville R. R. Co. vs. Childress*, 82 Ga., 719 (1889). There was a verdict against the railroad company for $3,500, on account of personal injury alleged to be permanent. The Supreme Court says (p. 720):

"The Court ruled that it had no power to order the examination without the plaintiff's consent. We understand the Court as putting the refusal solely upon the ground of a defect of power."

After quoting with approval from *Thompson on Trials*, § 859, and cases sustaining the doctrine, the Court continues (p. 722):

"As to the suggestion made in the argument, that the rule would operate hardly upon delicate and modest females, we could only say that they would be safely guarded by the discretion of the trial Judge. There would be no danger, we think, in this country of an examination being ordered needlessly or where an improper shock to modesty or feelings of delicacy would be likely. We decide simply that the power exists, and that in each case it is to be exercised or not, according to the sound discretion of the presiding Judge. We think there ought to be a new trial in the present case. As we deal only with the question of power, we forbear to enter into the nature of the showing which ought to be required as preliminary to its exercise, &c."

Another case in point is *Sibley vs. Smith*, 46 Ark.,

275 (1885). The Court states the alleged cause of action as follows (p. 276):

"Sandy Smith sued the receiver of a railroad corporation to recover damages for being forcibly ejected from a moving train. His complaint alleged severe external and permanent internal injuries, and he recovered a verdict and judgment for $2,000."

The defendant moved the Court that the plaintiff be required to submit to an examination of his person by experts. This motion was denied. The Supreme Court held that this was error, and for this reason reversed the judgment. After citing and commenting upon the cases, the Court concludes (p. 284):

"The rule to be deduced from these cases is that where the plaintiff in an action for personal injuries alleges that they are of a permanent nature, the defendant is entitled, as a matter of right, to have the opinion of a surgeon upon his condition—an opinion based upon personal examination. In refusing to order the examination, as it may do when the evidence of experts is already abundant, the Circuit Court must exercise a sound discretion; and its action is subject to review in case of abuse. There could not be a more flagrant instance of the evils resulting from such refusal than the present case affords. The plaintiff was an uneducated man, incapable of estimating the consequences of his injury except by the pain and inconvenience which it caused him. He was able to walk five or six miles after the injury, and, indeed, then stated that he had not been hurt at all. No physician attended him or testified at the trial. His claim for damages was based principally on alleged internal injuries, which could only have been understood and properly estimated by a physician. The verdict must have been largely founded upon such injuries, for there were no visible wounds which the jury could appreciate. And yet the plaintiff was allowed to testify to great and permanent injuries without the possibility of successful contradiction, the only means of ascertaining the real facts being denied to his adversary. * * *

For the error aforesaid the judgment is reversed and cause remanded for another trial."

Such, also, is the law of KANSAS, as is shown by the following case, decided when Judge BREWER was a member of the Supreme Court of that State:

Railroad Company vs. Thul, 29 Kansas, 466 (1883), was an action for personal injury to plaintiff. It was alleged that the injury to plaintiff's eyes was permanent. An order for surgical examination was applied for by defendant and refused by the trial Court. The Supreme Court held that the refusal was error, and for this reason reversed the judgment.

In the case at the bar the Court below states that he denied the order "on the *sole* ground that the Court had no legal right or power to make and enforce such an order" (Record, p. 2).

This is the law of ALABAMA:

Railroad Company vs. Hill, 31 Cen. Law Jour., 376 (decided June, 1890), was an action for personal injury. An order for a surgical examination of plaintiff, a woman, was refused by the trial Court. The Supreme Court of Alabama held that this refusal was error, and for this reason reversed the judgment.

This is the law also in OHIO. In *Turnpike Company vs. Baily*, 37 Ohio St., 104 (1881), the Court say (p. 107):

"There are only two questions in the case that we deem it necessary to notice: (1) The question arising on the refusal of the Court to require the plaintiff to sub-

mit his person to an examination; (2) that relating to the refusal to charge as asked.

These questions are answered by the following propositions, which we lay down as governing the case:

1. In an action to recover for personal injuries caused by the negligence of the defendant, the Court has power to require the plaintiff to submit his person to an examination by physicians and surgeons, when necessary to ascertain the nature and extent of the injury.

2. On the refusal of the plaintiff to comply with the order, when properly made, the Court may dismiss the action or refuse to allow the plaintiff to give evidence to establish the injury * * *

3. The refusal of the Court to order such an examination of the plaintiff will not be *presumed* to have been based on the ground of a want of power in the Court to make the order, but in the absence of any showing to the contrary, on the ground that, under the circumstances, the order ought not to have been granted."

[In the case at the bar the Court below states that he denied the order "on the *sole* ground that the Court had no legal right or power to make and enforce such an order" (Record, p. 2).]

This is the law in MISSOURI:

In *Legal vs. R. R. Co.*, 53 Mo., 569 (1873), the Court say (p. 515):

"The proposal to the Court to call in two surgeons, and have the plaintiff examined during the progress of the trial as to the extent of her injuries, is unknown to our practice and to the law. There was abundant evidence on this subject on both sides. Any opinion of physicians or surgeons at that time would have only been cumulative evidence at best, and the Court had no power to enforce such order."

That case is clearly overruled by the following cases:

In *Shepard vs. Mo. Pac. Ry. Co.*, 85 Mo., 629 (1885), the Supreme Court held that the trial Court had the

right and power to make such order, but that the trial Court had not erred in refusing the order under the circumstances of that case. So also in *Sidekum vs. W., St. L. and Pac. Ry. Co.*, 93 Mo., 400 (1887).

In *Owens vs. Ry. Co.*, 95 Mo., 169 (1888), the Court say (p. 178):

"The power of the Court to make and enforce an order for the personal examination of the injured party must be taken to be established in this State as it is in many others (citing cases). The Court might with propriety have made an order for the examination of the plaintiff in this case by a disinterested, reputable physician in the presence of her husband, if desired, and lady friends. But the real question here is whether there has been an abuse of the discretion lodged in the trial Court."

In NEBRASKA:

In *Stuart vs. Havens* 17 Neb., 211 (1885), the Supreme Court of Nebraska, while holding that *under the circumstances of that particular case* the trial Court committed no error in refusing to grant an order for the physical examination of plaintiff (three physicians having already testified as to plaintiff's condition), yet fully recognized the right of the defendant to have such an order in a proper case. The Court says (p. 215):

"An examination, if desired, should be made before the trial begins, although the Court may permit it to be made during the progess of the trial."

In the case at the bar the application was made before the trial began. As the Court denied that it had the power to make such an order, it was not necessary or decorous to have renewed the application on the trial.

The rule in Nebraska, as shown by *Stuart vs. Havens*, *supra*, and by *R. R. Co. vs. Finlayson*, 16 Neb., 578, is, therefore, that such an order may be had upon an application made to the Court before trial, such as was made to the trial Court in the present case.

In Minnesota:

In *Hatfield vs. St. Paul & P. R. R. Co.*, 33 Minn., 130 (1885), the plaintiff in a personal injury case and many other witnesses testified that the alleged injury caused her to limp when she walked. Counsel for defendant requested the Court to direct her to walk across the court room in the presence of the jury, which the Court declined to do, and the refusal was alleged as error. The Court held that the trial Court was justified in exercising its discretion to refuse such order. But the Court also go on to say (p. 131):

"As the object of all judicial investigations is, if possible, to do exact justice and obtain the truth in its entire fulness, we have no doubt of the power of the Court, in a proper case, to require the party to perform a physical act before the jury that will illustrate or demonstrate the extent or character of his injuries. This is in accordance with analogous cases in other branches of the law. When a view of real estate will aid the jury in reaching a conclusion, it is within the discretion of the Court to permit it. When an inspection of an article of personal property will aid them, it is not infrequent to cause the article to be brought into court for the same purpose. The practice in patent and in certain equity cases, of allowing tests to be applied before the Court, is somewhat analogous in principle. So is the practice of divorce courts, of ordering an examination of the person of the party in certain cases.

It is a common practice to allow plaintiffs in actions for personal injuries to exhibit to the jury their wounds, in order to show their extent or to enable a surgeon to

demonstrate their nature and character. This has been held proper. *Mulhado vs. Brooklyn, &c., R. R. Co., 30 N. Y., 370.* If for these purposes a plaintiff may exhibit his injuries, there would seem to be no reason why, under proper circumstances, he may not be required to do the same thing, for a like purpose, upon request of the defendant. In some cases it has been held that a party may be required to submit to an examination by competent professional men for the purpose of ascertaining the nature and extent of his injuries (citing cases)."

The Court held that in that particular case there was abundant uncontradicted evidence that plaintiff limped. It is to be noted that this was a visible symptom.

In *Parker vs. Enslow*, 102 Ill., 272, the Supreme Court of ILLINOIS say:

"The (trial) Court had no power to make or enforce such order."

But this was said without authority or discussion; and in the later case of *C. & E. R. R. Co. vs. Holland*, 122 Ill., 461 (1877), the Court apparently treats the question either as an open one in that Court or as settled in favor of such order in a proper case.

"Appellant appeared in Court and filed a motion, in writing, asking for an order of Court that appellee submit to an examination by two physicians, who are named in the motion. The Court overruled the application, and the decision is assigned for error. Whether that decision was erroneous or not is a question which it will not be necessary here to determine. * * * Nothing was lost by the decision, as appellant was allowed an examination, which was all it asked by the motion."

With reference to the conclusion that a trial Court

has the right and power to grant such order, a learned author with force and reason, well observes:

"This conclusion may be placed upon the higher ground that when a person appeals to the sovereign for justice he impliedly consents to the doing of justice to the other party, and impliedly agrees in advance to make any disclosure which is necessary to be made in order that justice may be done. The conception of the nature and objects of a judicial trial which denies to the defendant, under proper safeguards, the right of such inspection is not higher than that of the old law, which would not even compel a party to produce a deed or private paper in a civil case where it was intended to be used in evidence against him, a rule which the Court of Chancery invaded to prevent failures of justice, and which has almost entirely disappeared from modern civil jurisprudence."

1 Thompson on Trials, § 859.

THE QUESTION PRESENTED is interesting and important. In the interest of legal truth and of justice, we have made a careful examination of the reports to find every reported case in which the question has arisen or been decided. We believe we have above cited all of them. If we have omitted any they will doubtless be found on the brief of the adverse counsel, which we have not yet seen. We much doubt if they will find any cases not cited by us. Those cited by us may truly be stated to show an almost unbroken line of decision by many Courts of great respectability in opposition to the ruling of the Court below, and they rest firmly and solidly upon the proposition that when a plaintiff asks the judgment of a Court he submits himself to its jurisdiction, *places his case within the grasp of its inherent power*, which is comprehensive enough to authorize and even to require it to make all reasonable orders necessary for the ascertainment of the truth of the issue, whatever

that issue may be. If the power exists to make the order, the means of enforcing it is implied, and will not be difficult to find. It is pointed out in some of the cases above cited.

The Court's error was not waived or cured.

Counsel for the other party may perhaps attempt to show that the plaintiff made an offer to defendant to submit to a surgical examination. On the 13th day of May, after the case had gone to the jury, the attorneys of the plaintiff presented what he calls a bill of exceptions (Record, p. 3), (which, however, contains no exception to anything), which was signed by the Court, in which bill the effort was made to make it appear that *after the Court's aforesaid ruling* a tender or offer to submit to a surgical examination was made by the plaintiff.

We deny that such an anomalous paper (Record, p. 3) is part of the record. It is certainly not a bill of exceptions, for it excepts to nothing. It has not the essentials of a common law bill of exceptions as authorized by Statute Westm. 2d, 13 Edw. I., Chap. 31 (see Bouvier's Dict., "Bill of Exceptions;" Stephen on Pleading, 9 Am. Ed., Heard, * pp. 88, 89). It contains no action of the Court excepted to. Here the parties excepted to no opinion of the Judge, and the Judge signed or sealed no statement of his ruling on any point. Some of the statements in this anomalous paper, in fact, refer to matters which did not even take place in Court, but were recited in his presence by counsel, and in respect of which he made no decision, and to which no exception was taken. But if the

Court treats it as part of the record, it only shows, in its last analysis, that the plaintiff herself never consented to an examination, and that she failed to appear for and to submit to an examination, as promised by her counsel.

IN ORDER TO PLACE THIS MATTER CLEARLY BEFORE THIS COURT we make the following accurate statement of what occurred, stating in their chronological order the events as shown by the record.

On Friday, May 9, 1890, the defendant's attorneys applied to the Court for an order for examination of plaintiff, which was then refused, and exception taken to such refusal, as stated in the defendant's bill of exceptions (Record, p. 2). This was the whole transaction as to the application for and refusal of the order, and it occurred Friday, May 9th. The bill of exceptions, as is frequently and usually the case, was not actually signed until afterwards (in this case on Saturday, the 10th of May); but of necessity it had effect as of the 9th when the order was refused and the exception taken. This refusal of the order and exception thereto was, then, on Friday, May 9th, a single and complete transaction. If nothing further had occurred there could be even no pretence of any offer by the plaintiff to submit to an examination. We proceed now to show that in what occurred afterwards, from Saturday, May 10th, to Monday, May 13th, as stated in the so-called bill of exceptions of plaintiff (Record, pp. 3–4), there was nothing to change the situation as it was left, on Friday, May 9th, by the refusal of the Court to grant the order.

It appears (Record, p. 3) that on the forenoon of

Saturday, May 10th, the defendant's attorney showed to plaintiff's attorney the *defendant's* bill of exceptions, which appears in the record (at pages 2-3), and which was to be presented by defendant's attorneys to the Court for signature; and that thereupon the plaintiff's attorney endorsed on said bill of exceptions as follows:

"I will consent that Mr. Claypool, defendant's counsel, may examine the plaintiff this afternoon, in the presence of Mr. New and a physician he may select.

(Signed) A. C. HARRIS."

Dated May 10, 1890.

"Thereupon the defendant's counsel handed said bill of exceptions to the Court, who was then occupied in hearing an argument in another case; that thereupon the plaintiff's counsel said to the Court and attorney for defendant that they would consent that the defendant might examine the plaintiff as proposed, and would produce her at Mr. New's law office, in the City of Indianapolis (which is just opposite the United States Court), at two o'clock that afternoon, and asked defendant's counsel whether he desired to make the examination at that hour. He answered that he did not, as he wanted to go to the country and he did not know whether he could get his doctor. To this plaintiff's counsel replied that Dr. Hodges, his surgeon, had his office not two squares away. He said even then he had no assurance he could get the doctor at that hour."

The above, it is seen, was an offer by plaintiff's attorney, made on *Saturday*, May 10, to produce plaintiff for examination at two o'clock on the afternoon of the same day, which offer the defendant's attorney could not accept for the reasons above mentioned.

"Thereupon plaintiff's counsel then and there stated they would produce their client for such examination on Monday, before the trial of the cause might begin,

and asked defendant's counsel if they should do so, and he answered 'No,' because at that hour he understood that the trial would begin, and he could not make an examination just on the eve of beginning of the trial. On Saturday, when the matter was up (*i.e.*, at the time of this proposal to produce plaintiff on Monday), it was expected that this trial would commence Monday morning, at the usual hour of Court, 9:30 A. M."

The defendant's attorneys were clearly justified in refusing to undertake an examination before trial on the same morning when it was expected the case would come on for trial at 9:30 o'clock; an examination at such a time would have been only a farce.

Both the so-called offers above mentioned, as we have seen, were made for times when the defendant's attorneys could not avail themselves of them.

On Monday morning, May 13, the defendant's attorneys, finding that there would be time for an examination of plaintiff before trial—the Court not convening until 2 P. M., instead of 9:30 A. M. as was expected—

"informed the plaintiff's counsel that they desired the opportunity of having the plaintiff examined by a surgeon in advance of the commencement of the trial at 11 o'clock A. M.; to which request the plaintiff's counsel responded that he was willing for such examination, and would instruct his associate counsel, Mr. New, to appear at the hour named, at a convenient place designated, and notify the defendant's counsel whether the presence of the plaintiff could be procured for that purpose at the time and place mentioned. The plaintiff did not appear, however, for such examination, and the defendant's counsel were not informed that her presence could be procured—the plaintiff's counsel not being able to find her in time for such examination."

It thus appears that after the two so-called offers made by plaintiff's counsel on Saturday, which offers defendant's counsel could not accept because they were made

for times when they could not avail themselves of them, the defendant's counsel suggested a time for and asked for an examination, and that the counsel of the plaintiff agreed to the time and promised to procure the attendance of the plaintiff at a place designated by them, but *failed to do so*. So in short it will be seen that the plaintiff failed to allow the defendant that right which the Court had denied.

This agreement on Monday morning the 13th, between counsel as to a time and place for the examination of plaintiff clearly put an end to and rendered of no effect all former negotiations upon the same subject. All former offers of plaintiff's counsel were treated as amounting to nothing, as they really did, for the reason that they were made for such time that the counsel for defendant could not avail himself of them.

The result, therefore, of all the events after the Court refused to order, was that after some fruitless negotiation, in which the plaintiff's counsel suggested two times for an examination of which the defendant's counsel could not avail themselves, counsel for both parties agreed upon a time, and plaintiff failed to keep the agreement or to submit to an examination. This result, as we stated above left the situation just as it would have been if nothing further had occurred after the Court refused to grant the order.

The error of the Court, therefore, in refusing to grant the order for the examination of plaintiff was not cured by what occurred after the refusal of the order; for no opportunity was given to defendant to have such examination made.

The error in refusing to make the order was prejudicial to defendant. It is unnecessary because it would

be impossible to show what would have been the result of the examination; or the testimony of the surgeons who should make the examination. There was a clear case for an order requiring one, and, as the ground of refusing the order was wholly irrespective of the merits of the case, or of the subject matter as to which the surgeons would or might testify, prejudice to the defendant is presumed. The language in the opinions in the above cases is: "A proper examination, &c., *would have* opened a road by which, &c. (*Schroeder vs. Railroad Company, supra*, p. 13); "an examination, &c., *would in all probability have* greatly aided them * * *. It *would or might have been more satisfactory*, &c." (*White vs. Ry. Co., supra*, p. 14); and there is similar language in the other cases.

See also *Hollister vs. Nezmar*, 1 Ohio St., 1; *Wolf vs. Powner*, 30 Ohio St., 472; in which cases certain persons offered as witnesses were excluded as disqualified; and the Courts held that prejudice to the party was presumed irrespective of the subject matter of their proposed testimony.

II.

For these reasons this Court should reverse the judgment of the Circuit Court and give directions for a new trial.

JOHN F. DILLON,
HARRY HUBBARD,
For the Plaintiff in Error.

Office Supreme Court U. S.
FILED,
JAN 5 189

SUPREME COURT OF THE UNITED STATES.

UNION PACIFIC RAILWAY CO.

vs.

CLARA L. BOTSFORD.

BRIEF FOR DEFENDANT IN ERROR BY

ADDISON C. HARRIS.

JOURNAL JOB PRINTING CO., INDIANAPOLIS.

In Supreme Court of the United States.

UNION PACIFIC RAILWAY CO.

v.

CLARA L. BOTSFORD.

No. 1375.

ARGUMENT FOR DEFENDANT IN ERROR.

I. General Statement.

Clara L. Botsford sued the Union Pacific Railway Co. in the Superior Court of Marion county, Indiana, (Indianapolis), where jurisdiction was obtainable under the Statute of the State R. S. 1881, Section 309. The railway company removed the case into the Circuit Court, where a trial was had, and verdict and judgment for $10,000.

The declaration states that while Miss Botsford was *en route* in September, 1887, from Indianapolis to Sacramento, and being carried by the company in a "sleeper" as a passenger between Salt Lake City and Ogden, an upper sleeping-berth fell, striking her on the head, and inflicting great injury; that the accident happened because the "latch" or fastenings provided for holding the berth up were defective and worn out. It may be gleaned from the Record, (p. 5, folio 8,) that it was an "excursion."

Answer: General issue.

Although the company filed a bill of exceptions containing all the evidence, (Rec. p. 12), only mere fragments are brought up. From these fragments, and from the statements in the motion for a new trial, enough appears to show that before her injuries she was a "very robust young woman," (Rec. p. 5), possessed of "literary attainments" (Rec. p. 6), and "was regarded as having rather a superior mind," (Rec. p. 6), and had written for the press (Rec. p. 6). That after the accident she had symptoms of paralysis (Rec. p. 5.) That after her return to Indiana, in April, 1888, she was sick, greatly changed in appearance, and her mind was impaired (Rec. pp. 8–9), and she suffered severe pains in the back of the head, caused by the blow. (Rec. p. 10.)

The assignment of errors (Rec. p. 15), presents these questions:

1. The refusal of the Circuit Court to order Miss Botsford to submit to a "surgical examination" by defendant's surgeon out of court.

2. The instructions.

3. Admission of certain testimony.

Mr. Claypool informs us that the first only (perhaps) will be argued so we shall limit this brief (in the main at least) to the matter of the surgical examination of the person of the defendant in error, about which

II. The Facts

Are as follows: The record contains two bills of exception, stating together the whole procedure. (Rec. pp. 2-3-4.) The facts, arranged in the order of time, are as follows:

1. On May 9th, 1890, (being Friday) by agreement of counsel the Court ordered that the trial should not proceed until Monday, May 12th.

2. On the same day the defendant orally moved the Court for an order against Miss Botsford, "requiring her to submit

to a surgical examination, in the presence of her own surgeon and attorneys—if she desired their presence—it being proposed by the defendant that such examination should be made in a manner not to expose the person of the plaintiff in any indelicate manner."

The single reason for such request as stated to the Court, was: "That such examination was necessary to enable a correct diagnosis of the case, and without such examination the defendant would be without any witness as to her condition."

No affidavit was filed showing any necessity for such a procedure, or that Miss Botsford had refused on request to undergo an examination, or that defendant's counsel even believed it was necessary to the ends of justice. The motion was denied.

3. On the next morning (Saturday) a bill of exceptions was presented to Miss Botsford's attorneys, who endorsed thereon full consent that the examination might be had that day. Declining this offer, the attorneys for the company handed the bill with the endorsement, to the Judge, who at the time was occupied in hearing an argument in another case.

4. Miss Botsford's counsel then said to the Court and defendant's counsel: "That they would consent that the defendant might examine the plaintiff as proposed, and would produce her at Mr. New's law office (one of her counsel), in the city of Indianapolis (which is just opposite the U. S. Court), at two o'clock that afternoon, and asked defendant's counsel whether he desired to make the examination at that hour."

He answered that "he did not, as he wanted to go to the country; and he did not know whether he could get his doctor."*

To this plaintiff's counsel said, "Dr. Hodges (his surgeon,) had his office not two squares away."

*NOTE.—It thus appears that counsel for the defendant expected to attend in person, and take part in the examination.

Defendant's attorney replied: "Even then he had no assurance he could get the doctor at that hour."

Plaintiff's counsel then said: "They would produce their client for such examination on Monday before the trial of the case might begin, and asked if they should do so."

Defendant's attorney answered, "No;" because it was then expected the trial would begin on Monday, at 9:30 A. M., and *he* could not make an examination just on the eve of beginning the trial.

Whereupon the Court said: "If defendant's counsel refused to make the examination as offered, that the matter ought to be stated in any bill of exceptions."

Nothing more was then said.

5. On Monday morning the court did not convene, and the company's counsel then informed Miss Botsford's attorneys they desired to make the examination at 11 A. M. Her attorneys consented, but were not able to find her in time for such examination.

The court convened at 2 P. M., and the trial began before the jury.

III. Argument.

After a quite thorough research, we feel warranted in saying that no precedent will be found in any common law court in England or America, (unless given by statute) for the assertion of the power to force a suitor to submit his body to the surgical examination of his adversary. This is very strong proof that it does not exist. There are some recent cases in some of the States having Codes, to be noticed below, where it is held that on a proper showing of the necessity, the trial court may require a suitor to submit his body to medical experts.

The Constitution declares that in suits at common law, the right of trial by jury in the Federal Courts, shall be preserved. Hereby the historical jury of twelve, with all its incidents, is

preserved. The court must be open, and the proceedings public, as at common law. A suitor in an action at law in a Federal Court, can not be, even by an Act of Congress, turned over to ecclesiastical methods, or wager of battle, or martial law, or ordeal or compurgation. Congress has power to provide a mode of procedure consonant with the fundamental rights of a jury trial, but can not—at least has not—sought to enforce rules of procedure at variance with the well-known and fundamental principles of jury trial as it existed in this country and in England at the time of the adoption of the Constitution.

The omission to secure this right in civil cases in the original Constitution, led to conventions and public meetings throughout the states, and the wide discontent was only assuaged by inserting it by way of amendment, "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been contested with great jealousy." *Parsons* v. *Bedford*, 3 Pet. 446. What is the true meaning of the words "the right to trial by jury shall be *preserved?*" It is that the substance, and not the form, shall be retained. To incorporate ecclesiastical or military methods, would be to make it, while preserving the name, a hiss and a by-word in the mouths of men.

Congress has provided the mode of procedure in actions at law. Section 914 declares the "modes of procedure in civil cases (other than equity and admiralty causes,) in the Circuit and District Courts, shall conform *as near as may be*, to the practice, pleadings and forms and modes of proceeding" in the State courts.

It was settled in *ex parte Fiske*, 113 U. S. 713, that the above section does not bring into the Federal Courts the various provisions of the Codes authorizing a suitor to examine his adversary out of court in advance of the trial.

SEC. 861. "The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided."

No provision is made, and we submit under the Constitution none could be made, requiring a suitor to submit his person to the private examination of his adversary out of the presence of the Court and jury.

SEC. 724. "In trials of actions at law the courts of the U. S. may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power which contain evidence pertinent to the issue, etc.," and providing a penalty of non-suit or judgment as a default.

The fact that the Statute is silent as to "surgical examination," is high proof that the power does not exist.

Fiske refused to submit to an oral examination out of court. This Court held he was in the right, saying:

"The case before us is eminently one of evidence and procedure. The object of the orders is to procure evidence to be used on the trial of the case, and this object is effected by a proceeding peculiar to the courts of New York, resting alone on a statute of that state. There can be no doubt that if the proceeding here authorized is in conflict with any law of the United States; it is of no force in the courts of the United States.

"We think it may be added further in the same direction that if Congress has legislated on this subject and prescribed a definite rule for the government of its own courts, it is to that extent exclusive of any legislation of the States on the same matter."

As the mode of proof in the Federal Courts is exclusive of the Code plan of extorting admissions to be used or not on the trial at the pleasure of the adversary (as is the rule in Indiana, R. S. 1881, Sec. 511—"may be read by the party taking it at his option.")—how much less reason is there for forcing a suitor to submit his body to his adversary for inspection and surgical examination, and in presence of his witnesses and attorneys.

It was settled in this Circuit in *Easton* v. *Hodges* 7 Bis, 324. After referring to the sections above and others, it was said:

"In view of existing statutes of the United States relating to the entire subject of evidence, and the examination of witnesses, and giving to those statutes, as I think we must, exclusive application here, the conclusion is: That a party to an action at law can not be examined at the instance of the adverse party before trial, except in cases where depositions before trial are specially authorized; and that the production of books and writings must be enforced according to the modes of procedure, not deriving their origin from State statutes or practice."

A "surgical examination" carried on in pantomime would be a farce indeed. To be of any value, the person undergoing examination must answer all proper inquiries. The questions and answers are necessarily a part of the examination. Only scars and external defects can be seen. This was not an application for an "inspection" of Miss Botsford's body, but for a "surgical examination." No reputable medical man would care to hazard a sworn opinion on merely looking at a nude limb or body.

What portion of the body is to be examined? Does pressure produce pain? Without an answer he can not tell. Is memory impaired? It can only be told by vocal tests.

In short if a Court were to direct a "surgical examination," he would expect and require the officer or expert to use all the available and well known methods to ascertain the present physical or mental condition, and would of course expect and require full and true answers to be made to the examiner, that he might make the most reliable and intelligent opinion in his power. In brief, the suitor must not only tell his adversary all his symptoms, but name the time and character of his injuries, his life since, and the treatment had, as fully as he would to his own chosen physician and attorney.

Such procedure is entirely foreign to the genius of the English speaking people.

A Federal Court will not send a common law case to a referee, nor require a jury to answer interrogations, or restrain the judge from discussing the evidence, or send the instructions

to the jury room, and like things recognized by the Codes, when contrary to the vital rules of the common law mode of procedure, or in conflict with the laws of the United States.

R. R. v. ~~*Hunt*~~ *Horst*, 93 U. S. 291;
Nudd v. *Burrows*, 91 U. S. 429;
Newcomb v. *Ward*, 97 U. S. 581;
Lemaster v. *Keeler*, 123 U. S. 376;
In re Chattanuga Iron Co., 128 U. S. 544;
Howe Machine Co. v. *Edwards*, 10 Blatchf. 402;
Beardsley v. *Little*, 44 Blatchf. 102;
Corbett v. *Gibson*, 16 Blatchf. 336;
United States v. *Rathbone*, 2 Paine, 578;
Green v. *Biddle*, 8 Wheat. 1;
Elmore v. *Grimes*, 1 Pet. 439;
DeWolf v. *Rabaud*, 1 Pet. 476;
Bank v. *Dudley*, 3 Pet. 492.

IV. Indiana Practice.

If it be urged that physical examination is a mode of procedure, or practice adopted by Congress in the various States, then we answer, there is no Statute in Indiana authorizing it, and the Supreme Court has never sustained it as a matter of right. The Statute only authorizes one party to examine another out of court and before the trial, "as a witness concerning any matter stated in the pleading." R. S. 1881, Sec. 509. This is only allowable because the Code blends law and equity, and is in lieu of a bill of discovery.

Barnard v. *Flinn*, 8 Ind. 204;
Mason v. *Weston*, 29 Ind. 561.

There are only three cases in Indiana on the subject:

1. *Keyn* v. *Bridewell*, 119 Ind. 226. Action for slander, in charging the plaintiff, an unmarried female under 21 years of age, with unchastity.

On the trial, the defendant asked "the Court to order the plaintiff, Addie M. Bridewell, to submit her person to an examination by medical experts." The Court say:

"Waiving all questions as to the informality of the application, we do not think there was any error in the ruling of the Court in refusing to grant the application and make the order. We are not cited to any case where any Court has held such an examination to be proper, and we think none can be found."

2. *Hess* v. *Lowry*, 122 Ind. 225. Action for malpractice.

After the close of the plaintiff's evidence and while the defendant was examining a medical expert as a witness, he asked the Court to order the plaintiff to submit to a private examination by the defendent's medical experts. The plaintiff offered to submit to an examination in the presence of the jury, or to a private examination on the next morning or as soon as he could secure the presence of his own expert witnesses. Thereupon the Court refused to make the order for an immediate physical examination. On appeal, the Court say:

"It is undoubtedly true that the Court may, in its *discretion*, in a proper case, if application is seasonably made, require the plaintiff to submit his person to a reasonable examination by competent physicians and surgeons, when necessary to ascertain the nature, extent and permanency of injuries. But where the application is not made until after the close of the plaintiff's evidence, and no reason is shown for the delay in making the application, it will not be error to refuse the order, especially *where the plaintiff offers to submit to a private examination as soon as his attendance of medical experts on his behalf can be secured.*"

3. *T. H. & I. R. R.* v. *Bunker*, (unreported); decided Dec. 10, 1890. Action against a railroad for personal injuries.

After the plaintiff had rested his case in chief, defendant by its counsel in open court, requested the plaintiff to submit to an examination by medical experts, so that his true condition at the time might be determined.

The Court say:

"The motion was not supported by any affidavit showing any necessity for it, or any belief as to what such examination would develop. It was a mere request of counsel during the trial of the cause, after appellee had rested, without showing even that it was believed any benefit would be derived from such examination.

"Were it an open question we would feel constrained to hold that there was no such error committed as authorized a reversal of the judgment; but the case of *Hess* v. *Lowery*, 122 Ind. 255, is decisive of the question here presented: see also *Kern* v. *Bridewell*, 119 Ind. 226."

It will be observed that the Court is careful not to say that a suitor may have a physical examination of the body of the adversary, as a matter of right, on mere motion, without a sufficient showing of the necessity. Will any one contend that the bare statement of counsel "that without such examination the defendant would be without any witnesses as to her condition" at the trial, is enough? If so, it follows that defendants may have a surgical examination of the plaintiff's body in every case where the defendant has purposely, or negligently hurt or maimed the body of one who dares to seek redress in the courts.

V. Technical Point.

It has been urged, and may be here, that because it is stated in the first bill of exceptions that the Circuit Court "overruled said motion, and refused to make said order upon the sole ground that this Court had no legal right or power to make and enforce this order," that on this writ of error this Court must not consider whether there was a proper showing, or any other question than that of naked power.

The same point was made in *S. C. & P. Ry. Co.* v. *Finlayson*, 16 Neb. 578.

It was an action for personal injuries.

During the trial, defendant moved the Court to order the plaintiff to submit to a physical examination by its own physicians. "The Court ruled that it had no power to make such an order." (p. 588.)

On appeal, the Court said:

"It is fundamental that if a decision or ruling of the Court is correct, the fact that the reason assigned therefor by the Court, when making it, is not sufficient to sustain the order, the fact of such de-

ficient reason being given,' will not vitiate the ruling or order. The question now before us is: Did the Court err in its refusal to make the order requested? We think not. It is not the premise of Courts to make useless and unnecessary errors simply because they are so requested. There was no showing made to the Court that a permission to make examination had been refused by defendant in error, nor that any such permission had been requested. There is no showing of any kind that such an examination was necessary in order to aid plaintiff in error in making its defense. Indeed, there was no intimation made that any good could possibly result or benefit be derived from such an examination."

VI. State Cases.

If we enter on an examination of the cases throughout the country as to whether the power exists at all, we embark on a "vexed sea." It is denied in Illinois, New York and Nebraska.

1. *Parker* v. *Enslee*, 102 Ill. 272 (1882).

The defendant kept a grocery store, wherein for years he provided a box of smoking tobacco on the counter for the use of his customers. The plaintiff was in the habit of filling his pipe at the box. On a certain occasion he filled his pipe and when he applied a match, an explosion occurred, which seriously and permanently injured his eyes. The explosion was caused by powder being mixed with the tobacco. A motion was made that the plaintiff should submit himself to a medical examination. On appeal, Mr. Justice Scholfield said:

"Complaint is also made that the Court refused to compel appellee to submit his eyes to the examination of a physician in the presence of the jury. There was no error in this. *The Court had no power to make or enforce such an order.*

2. *Roberts* v. *R. R. Co.*, 29 Hun. 154 (1883.) Action for injuries received while being carried as a passenger.

At special term, an order was made that Mrs. Roberts should "submit to an examination of her person by physicians, selected by the defendant, under the supervision of a referee, to ascertain whether she was suffering, as she alleged, from injuries

caused by the alleged negligence of the defendant." The order was obtained upon affidavits. On appeal, the Court refused to follow the decision in the *Schroeder's* case (47 Iowa, 375,) or the analogies sought to be drawn from cases of divorce, impotency and pregnancy.

"But again passing over such cases as that of *Devonbagh* v. *Devonbagh*, (a case of incurable impotency), we know of no right which this Court has to compel a party to submit to any bodily examination. In a common law action like this, the jury are to pass upon issues of fact. And they are entitled to see and hear for themselves, the evidence. It is of the very essence of the common law system, that the evidence shall be produced before the jury. The exceptions to this rule (and not desirable exceptions), are those cases in which evidence is previously reduced to writing, and then read to the jury.

* * * * * * * * * *

"It is undoubtedly true that not infrequently plaintiffs suing for bodily injury, have exhibited in court the injured part. Nor do we know of any reason why they should not do this; notwithstanding the exhibition may excite sympathy. And on the other hand, all unreasonable concealment of the injured part (not justified by any dictate of modesty or otherwise) may excite a doubt in the mind of the jury as to the genuineness or extent of the alleged injury. But we can not admit the principle that, either in the presence of a jury or in the presence of a referee, a party can compel his opponent to exhibit his body in order to enable physicians to examine and question and testify.

"Section 831 of the Code, forbidding a physician to testify to information obtained while attending a patient, necessary to enable him to act, is not strictly applicable to the question now under consideration. But, if the law will not permit a physician, voluntarily consulted, to reveal what he has learned, can it be that the law can compel a party to reveal by exposure of the body, and by answers to questions, facts to the physician, to which he may afterwards testify in court?

"There may be danger that in actions of this nature, plaintiffs will exaggerate the injuries they have received, and defendants may be at a disadvantage in ascertaining the exact truth. But this evil is far less than the adoption of a system of bodily and perhaps immodest examinations, which might deter many, especially women, from ever commencing actions, however great the injuries they had sustained."

Newman v. *Third Ave. R. R. Co.*, 50 N. Y. Superior Court, (R. 412);

McSwyng v. *Broadway & c. Co.*, 7 N. Y. Supreme Court, (R. 456, 1889),

Cook v. *Manufacturing Co.*, 3 N. Y., Civ. Prac. (R., 332);

3. *Stuart* v. *Haven*, 17 Neb. 211, (1885.) Action for personal injuries.

During the trial the defendant asked the Court to "make an order requiring Haven to exhibit his arm to four physicians called by him (the defendant.)"

Refused. Exception. Appeal.

The Court said:

"Where in cases like this, experts are called by the party and permitted to make a personal examination of the person injured, and to testify therefrom, there is danger that they will feel under obligations to the party calling them, and however honest they may be, color their testimony somewhat in his interest; while in many, if not most cases, their general views upon the question will be known to the party producing them before they are called. In any event, the evidence partakes somewhat of a partisan character. To avoid this, they should be agreed upon by the parties, or appointed by the Court."

4. *Shepard* v. *Mo. P. Ry. Co.*, 85 Mo., 629. Action for injuries to the person of Eliza T. Shepard while being carried as a passenger.

Defendant filed a motion showing that she claimed to have received "serious and permanent injuries to the coccyx, or terminal bone of the spinal column," with an affidavit of Dr. Jackson, the defendant's surgeon, that soon after the accident he made a personal examination, and that he believed therefrom that her claims were false. She declined to submit to an examination by Dr. Jackson, but offered to submit to such an examination by Dr. Baudeny, of St. Louis. Motion denied.

The Court say:

"There are respectable authorities which hold that the Court may order such personal examination. There are others to the contrary. We are inclined to hold with the former, *but not that a party has an absolute right* to have such personal examination. It is a matter in which the Court has a discretion which will not be interfered with unless manifestly abused. The case at bar is a fair sample of these in which it may and should be refused."

"It is with reluctance, and only from absolute necessity, that a lady of refinement ever submits to such a personal examination, even by her chosen physician, as defendant asked that this plaintiff should submit to. * * * If, and we have no reason to doubt it, plaintiff is a lady of refinement, she would rather have given up the case, and dismissed her suit, than to have submitted to what this defendant proposed."

The earlier cases in Missouri denied the power, while the later leave it as a matter of discretion with the trial court.

Lloyd v. *R. R. Co.*, 53 Mo. 515;
Owens v. *Ry. Co.*, 95 Mo. 169;
Sidekum v. *Wabash Ry. Co.*, 93 Mo. 549.

5. In *Page* v. *Page*, 51 Mich. 88, it appeared in a divorce proceeding, after the case was at issue, the trial court made an order for the physical examination of the body of the defendant. It is best told in the words of that eminent jurist,

Judge Cooley:

"There was also a most extraordinary compulsory examination of defendant by physicians, who stripped him and subjected him to oral inquisition, to compel him to give evidence which they could repeat before the Commisioner for use against him. What means they could be supposed to have for compelling him to answer their questions, in case he declined, as he ought to have done, we do not know; but we are certain they could not be means known to the law. We strike from the record all the evidence obtained by this inquisition also. It should be understood that there are some rights which belong to man, as man, and to woman, as woman, which in civilized communities they can never forfeit by becoming parties to divorce or any other suits, and that there are limits to the indignities to which parties to legal proceedings may be lawfully subjected."

On turning to the other side it will be found that *Schroeder* v. *Railroad Co.*, 47 Iowa 375 (1877,) is the parent case.

A railway employe sued for personal injuries. On the second trial, after the jury were impanelled, the defendant filed a written application, asking that an order of the Court be made, requiring the plaintiff to submit to an examination by physicians and surgeons, to be selected in equal numbers by plaintiff and defendant, of which number the defendant's own medical officer should not be one of the number. In support of this application, the affidavit of the surgeon and physician in the employment of defendant was filed, stating that he had frequently attended plaintiff, immediately after he was injured, and had made personal observation of plaintiff's condition, and had heard his testimony at the former trial, and it was his belief, based upon these means of knowledge, that his injuries were not of the character and extent claimed by him, and that the truth of the matter could be ascertained by a proper personal examination of the plaintiff. The trial court refused to allow the motion. On appeal, the Supreme Court said:

"We have been able to find no case in which the question before us has been considered, and we have been referred to no authority by counsel that seems to have much application thereto. The Courts have held in divorce cases, when the impotency of a party is in question, an examination may be ordered of the person alleged to be impotent. The foundation of this rule is the difficulty of reaching the truth in any other way than by the examination of the person. The authorities referred to may be regarded as giving some support to our conclusions."

And for this reason the case was reversed, and has been followed in Kansas, Wisconsin and Arkansas.

A., T. & Santa Fe R. R. Co. v. *Thul*, 29 Kan. 466;
White v. *Milwaukee City Ry. Co.* 61 Wis. 586;
Sidley v. *Smith*, 46 Ark. 275.

In the Kansas case (an application to have an oculist examine the plaintiff's eyes,) the Court was careful to limit the power:

"We would think that the defendant, in a case like the present, would be entitled, as a matter of right, *upon a proper application, and upon a proper showing*, to have an order made by the Court compelling the plaintiff to submit himself to a personal examination for the

purpose of ascertaining the nature, character, extent and permanency of his injuries: but of course the Court should exercise sound judicial discretion in making such an order. The right to the order being founded upon necessity, would not, of course, extend beyond the necessities of the case."

I. & G. Ry. Co. v. *Underwood*. 64 Tex. 463. Suit by a passenger for injuries to his body and lower limbs. Motion for physical examination by three disinterested physicians and surgeons. Denied. Appeal.

The Court say:

"This motion stated no fact which made the granting of it necessary. It was not shown to be necessary to the full presentation of all the facts, nor was it shown that the plaintiff was unwilling to have such an examination made by any respectable surgeon. * * Under what circumstances such a right exists and may be enforced, it is not necessary in this case to determine. It certainly will not be recognized and enforced unless shown to be essential to the ends of justice." * *

In *M. P. R. R.* v. *Johnson*, 72 Tex., p 101, it was said:

"If this power should be exercised at all, it should be by the appointment by the Court of one or more disinterested experts, either of its own selection or such as may be agreed on by the parties."

It seems to be settled that in common law actions for personal injuries the parties can not be compelled to exhibit to the adversary, or produce in court the machine or other instrument causing the accident.

Cook v. *Manufacturing Co.*, 29 Hun. 641;
Hunter v. *Allen*, 35 Barb. 42;
Anson v. *Tuska*, 19 Abb. 391.

Or show the adverse party before trial, evidentiary documents:

Guyot v. *Hilton*, 32 Fed. Rep. 743;
Colgate v. *Com. Franc.*, 23 F. R. 82.

It has been held by the English Courts that they had no power to require one party to admit the other, or his witnesses,

to enter his premises for the purpose of inspecting work done in suits for the recovery of the vale of work and labor.

Turquond v. *Strand Union*, 8 D. P. C. 201;
Newham v. *Tait*, 6 Scott, 575;
Stones v. *Menhem*, Exch. 382.

See, also—

Shadwell v. *Shadwell* 6 C. B. (N. S.) 679;
Reg. v. *Wycherly* 8 C. & P. 262.

We submit that the error in the parent case (*Schroeder* v. *R. R. Co., supra*); lies in assuming that a common law court may exercise the powers and modes of procedure resorted to in ecclesiastical tribunals. "The Law of Necessity" also appealed to is the last reason for any exercise of arbitrary power. It is practiced widely by other peoples to force an accused to confess to a crime which can not be proven. It was the argument for burning witches. It gives jurisdiction to a Lynch Court. In case of injury to the person it assumes that the plaintiff will commit perjury, and fabricate or falsify so artfully as to outwit acute lawyers, mislead experienced judges, and deceive intelligent juries.

A practice which is so revolting to the English mind, must rest upon Statutes or better reasons than these.

An English magistrate made an order that a poor girl, Annie Agnew, should submit to an examination, she being under a warrant on a charge of concealment of birth. An English society for the defence of personal rights, brought suit, and it was held to be an assault, and a verdict for £50 was sustained.

Mr. Moak reports the case in this country (19 Eng. Rep. Moak's Notes 612,) and adds a letter by Mr. Allen, when Attorney-General of Massachusetts, declining on behalf of the Commonwealth, to exhibit to the prisoner's counsel articles of evidence to be used on the trial. And the Court, on a motion therefor, stated "that they should make no order, and had no advice to give to the Attorney-General."

We have pursued this question at greater length than the case requires, because of the interest manifested therein by the Courts and bar throughout the country. Much we have said falls entirely without the boundaries of this case. What is not shown by the record does not exist. It is not shown that the plaintiff or her counsel were present in court on May 9, 1890, when the motion was made, or that any notice thereof had been given them. It does not appear that any physician or surgeon was named to the Court as a proper person to make the examination, nor how many persons selected or employed by the defendant would be present, engaging in the investigation; nor was there any showing of a refusal on the part of the plaintiff or her attorneys to accord an examination. On the other hand, it appears that as soon as the matter was brought to the attention of the plaintiff's counsel, they endorsed upon the proposed bill of exception, before it was signed, and declared and stated in open court at the time, that they yielded to the demand and would produce their client at Mr. New's law office at two o'clock that afternoon, where the defendant might examine the plaintiff as proposed. That defendant's counsel refused to make the examination at that hour. That thereupon plaintiff's counsel offered to submit their client to such examination on Monday morning, before the trial of the cause might begin, which was again declined.

As we have seen, Courts which justify the exercise of the power, say that it is discretionary; that no order should be made unless after request and refusal; that the examination, if made, should be made by competent and indifferent men, selected by the Court or the parties, after affidavit showing the necessity of such an examination, and that it is believed the plaintiff has testified, or will testify falsely, is a malingerer, or unable honestly to state or prove facts enough to intelligently advise the Court and jury of the real condition of the plaintiff at the time of the trial. Will it be presumed in the face of the record showing that physicians were examined, that the Court and jury were not so advised? As appears by the instructions, the defendant did not dispute the fact that the attachment or device which held the berth in position, when shoved up and not

in use, was defective, thereby causing the accident. The instructions further state "You (jury) heard the physicians and others who spoke of the character and extent of the plaintiff's injuries, the pains she has endured, and may continue to endure," so that the whole matter was before the Court and jury. It further appears that the railway company did not introduce any countervailing evidence on the trial as to its liability.

Is it not apparent then that the sole purpose of this proceeding was to make a technical question in the record? No available exception was taken to the instructions which appear to have been given in the presence of the case of *Pennsylvania Co.* v. *Roy*, 102 U. S. 545.

We had believed we would be given the opportunity of reading appellant's brief before preparing this, but it seems that other counsel than they, trying the cause, will brief the case and we can not longer delay. This may be accepted as our apology for a somewhat lengthy and hasty discussion. We have divided the labors so that the undersigned has treated of the question of physical examination, and Mr. New of the other questions which may be discussed.

Respectfully submitted,

ADDISON C. HARRIS,
Att'y for Defendant in Error.

Indianapolis, Jan. 2, 1891.

1375

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JAMES H. McKENNEY,
CLERK

UNITED STATES OF AMERICA, S. S.

IN THE

Supreme Court of The United States

OCTOBER TERM, 1890.

No. 1375.

THE UNION PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

APPELLEE'S BRIEF.

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STATEMENT.

This action was commenced in the State court of Indiana by the appellee against said railway company for damages on account of injuries sustained by her whilst a passenger on board its cars in the month of September, 1887.

The complaint in substance charges that the appellee, on the 28th day of September, 1887, took passage upon the cars of said company's road as a passenger *en route* from the city of Indianapolis, Indiana, to the city of Sacramento, in the State of California; and that whilst aboard the cars of the defendant at a point between Salt Lake City and Ogden, without any fault or negligence whatever on her part, and wholly because of the carelessness and negligence of said company in the coustruction and care of certain sleeping berths and the attachments employed in the utilization of the same, and because of the defective and badly worn attachments by which said berths when not not in use, were suspended; and whilst the plaintiff was sitting in a "sleeper coach," immediately under one of such berths by such worn and insecure attachments held to its place as aforesaid, such certain upper berth gave way and sprung loose from its latching and the same, with all its appliances and parts connected therewith, was precipitated with great force against the person and body of the plaintiff, striking her on the head, badly bruising, maiming her, and greatly injuring her brain and spinal cord, resulting in great suffering and pain; which injuries are averred in the complaint to be permanent and to the damage of the plaintiff in the sum of $10,000.

On motion of the plaintiff in error, this cause was transferred from the state court to the United States Circuit court for the district of Indiana for issue, trial and judgment.

In said circuit court, a general denial was filed, upon which issue, as made by said answer, the cause was tried and a verdict of $10,000 damages assessed against said company, by the jury.

The Apellant's motion for a new trial was over-ruled by the court and judgment rendered upon such said verdict, from which this appeal is taken.

THE ERRORS ASSIGNED.

The errors assigned are six in number as follows:

First; The error of the court in not sustaining and allowing the defendant's motion to prevail for an order against the plaintiff requiring her to submit to a surgical examination in the presence of her own surgeon and attorneys if she desire their presence, the court, on be-

ing informed that such examination was asked for the purpose of obtaining information about the condition of the plaintiff and that without such examination the defendant would be without any witness as to her condition; which motion was not allowed upon the sole ground as ruled by the court "that the court had no right or power to make and enforce such order," to which ruling the defendant at the time excepted.

Second; Error of the court in each and every part of the instruction given the jury and particularly as follows:

(A). The court assumed and stated facts as proven, which should have been submitted to the jury for their finding.

(B). The court after stating what witness had testified added "This evidence was not disputed by defendant and it is not claimed "that when the berth fell the plaintiff was where she had no right "to be or that by her own negligence she contributed to the injury."

(C). The court assumed and stated to the jury that the plaintiff was injured by the falling of the berth on her head and while she "was quietly in her seat."

(D). That the general terms of the instructions of the court "*was*" such as to impress the jury that, in the opinion of the court the plaintiff ought to recover and that the plaintiff had been greatly damaged without admonishing the jury that they were the exclusive judges of the evidence

The 3, 4, 5, and 6 errors assigned all raise the question as to whether non-expert witnesses should be permitted to testify as to such complaints and expressions of pain as they may have heard the plaintiff make concerning her injury, prior to the trial.

We have called the court's attention to these errors, as assigned, for the reason that we are not advised that the appellant has, or will brief this cause, and, hence the obligation in this regard resting upon it, falls upon the appellee.

ARGUMENT.

It is a recognized rule of your court and therefore the law that in all cases which have been tried under the law and rules of practice of any particular state, provided however, the questions are not federal in their character, especially so in common law cases, that the law and rules of practice of such state shall govern the proceedings in said cause, even on its final determination in the Supreme court of the United States.

Such being the case, this cause was tried below and will no doubt

be tried here under and in pursuance of the laws and rules of practice of the state of Indiana. Therefore, in discussing the questions presented, as to the competency of the certain evidence and statements mentioned in the errors assigned, we will be governed altogether by the law of Indiana.

The third and fourth errors assigned, together, go to the competency of certain statements made to the jury by William H Dye, a witness testifying for plaintiff.

All this witness's evidence may be found at pages 7, 8, and 9 of the record..

This witness testified that he did not see the plaintiff for probably two weeks after she came back from the West; that he thinks it was in April 1888, and that she was then stopping at his mother's house. Thereupon, as the record recites, the following question was put to him by the appellee's counsel:

"You may state what, if any thing else, you noticed in her appearance or conduct; describe it to the jury." To this question appellant's counsel made objection in the following language:

"May it please the court as to the other, I will put in this objection, that the statement about how her mind seems is giving his conclusion and is not proper. He can state what she said and did, so that the jury can see whether his conclusion is correct or not."

Upon this objection being made the court ruled in the following language:

"I will over rule that objection and will let that go to the jury, that is in the nature of the fact."

To which ruling of the court the defendant at the time excepted.

It will be noticed that question 21, put by appellee's consel did not in any respect call for any opinion of the witness as to the defendant's condition of mind, or as "*to how her mind seems.*"

The witness was simply asked to state what he noticed in her appearance, or conduct and to describe what he saw or noticed to the jury; hence the objection made by appellant's counsel and upon which the court ruled was not in any respect in point in this: that it did not go to the subject matter sought to be elicited by the question.

The answer to this question is not upon the subject of the condition of the plaintiff's mind in any respect, and hence the defendant could not be injured by the action of the court in over-ruling this objection, even though it should be concluded that the answer made to the question, if any, were inadmisible.

At page 8 counsel for defendant make further objection in the following language:

"I am objecting to all this testimony the court understands."

It will be noticed that no reason is here given by counsel in support of his objection, nor is any specific part of the evidence given by witness objected to, and further that counsel in making the said objection did not even state to the court that his cause of objection had been theretofore given to the court, or for reasons aforesaid.

Absolutely nothing was stated by counsel to indicate to the court a reason for his objection.

Although counsul stated to the court, "that the court understands that he is objecting to all this testimony" nevertheless the record does not disclose the fact as to whether the court assented to this proposition or not. In so far as the record shows, the statement of counsel did not reach the ear of the court.

Immediately following this objection is question numbered 24 in the following language:

"This is at what date." to which the witness makes answer as follows: "It was along in May and June and up in July while she was at my mother's."

Here again counsel for appellant makes further objection in the following language: "May the court please this is nearly nine months, after the accident, and complaints made at that time "are not competent evidence, and I object to it on that ground."

"While a person is sick and in pain their declarations and expressions of pain alike, are competent; but her own declarations six or nine months, or nearly a year afterwards are not competent evidence."

It will be noticed here that no question is put the witness in response to which he would be reasonably expected to detail the complaints made by the plaintiff at any particular time.

The fact, is no question whatever, is put the witness for him to answer.

Pending this objection the court, of its motion put the following questions:

"You said she was in bed part of the time." To which the witness made answer, "Yes sir, she was in bed right smart of the time when I was up there; she was first up and then out of the room and then in her bed."

The court then put question 26 as follows:

"You say her recollection was bad." To which the witness an-

swered, "Yes sir, it was." Thereupon the court put the further question; number 27: "That she forgot," and the witness answered as follows: "Yes sir, she did, she was very forgetful, when we were talking about different things she would kind of drop off into a kind sleep like."

Here the court assumes to question the appellant's counsel in the following language: "That you want to exclude." to which Judge Claypool answers as follows: "Most clearly your Honor the witness may state the conversation and the details of the conversation but not a conclusion like that; and the other ground of objection is that being sick afterwards may have resulted from another cause entirely. It is so remotely connected with the case, I think for that reason it ought to be excluded."

Here the court responds as follows: "I do not know where they will go. They may endeavor to show that she remained in a disabled condition from the time of the injury up to this time."

Thereupon Mr. New, of appellee's counsel spoke as follows: "Yes sir, we will show it too, even up to to-day."

Thereupon Judge Claypool spoke as follows: "I will save the question." And the court answers as follows: "*Note the objection of counsel.*"

It will be observed here that no ruling was made by court, nor was any exception taken by counsel.

But, to the merits of the question, appellee's counsel in response to the inquiry of the court stated they would show that she remained in a disabled condition from the time of the injury up to the day of trial. This being true, the objection of appellant's counsel as to the remoteness of the evidence is wholly met and is therefore of no avail.

The witness Lucetta Dye was next called by the plaintiff and after she had testified, as recited by the record at pages 9 and 10, and after the plaintiff had fully examined her in chief, counsel for defendant make objection to the court in regard to her testimony in the following language: "Now may the court please I object to the testimony of this witness upon the ground that she is not an expert and that she cannot give an opinion as to the condition, health and mind of the plaintiff without first giving the facts upon which these statements are based. "I object further to all and each part of her testimony upon the ground that it is irrelevant and immaterial, and upon the further ground that it is too remote from the time when the injury under investigation was received."

Thereupon the court ruled in the following language: "The court

over-ruled the objection to which ruling the defendant at the time excepted."

See record P. 11.

This court will note that no motion was made by counsel for the defendant to strike out the testimony, or any part thereof of said witness.

We wish it also remembered that said witness was not asked to give an opinion "as to the condition of health and mind" of the plaintiff. Nevertheless, if any answer which she made can be construed as being in the nature of an opinion as to either "health or mind" of the plaintiff, a careful reading of her evidence will fully disclose the fact that she was competent to give such an opinion, even under the objection of counsel, because "*she had first given the facts upon which such opinion were based.*"

The Supreme court of the state of Indiana have held that non-experts may testify as to the appearance, deportment, health and other characteristics of the person which they have observed as a result of their acquaintance and observation; and that inquiry into such subjects is proper to elicit the facts upon which the expert may testify.

See Carthage Turnpike Company vs. Andrews, 102 Ind., Page 141 et seq.

"Non experts may give their opinion on questions of identity, resemblance, apparent condition of body, or mind, indication, insanity, sickness, health, value, conduct; and particularly whether friendly or hostile and the like."

First Greenleaf on Evidence, sec 440.
Chicago R. R. Co. vs. George, 19 Ill., P, 510.
Willis vs. Quimby, 11 Foster (N. H.), 485.
Eliot vs. Van Buren, 33 Michigan, P. 49.
Parker vs. Boston Co., 109 Mass., P. 449.
Com. vs. Sturtivant, 117 Mass., P. 122.

The objection to the testimony because it is "irrelevant and immaterial" raises no question under the Indiana practice.

See Lake Erie & Western Railway Company vs. Parker 94 Ind. Page 91.

The third objection is that of the remoteness of the facts elicited, from the time of the injury. We think this presents no question.

It is competent to show such complaints and declarations of pain as the injured party may have made even up to the time of the trial. And the remoteness of the same from the time of the injury shall

only go to the jury in determining the weight, if any, which may be given any such remote declarations.

See Louisville, New Albany & Chicago Railway Company vs. Wood, 113 Ind. Page 559.

Travelers' Insurance Company of Chicago vs. Mosley 8th Wallace Page 397.

Quaife vs. Chicago etc. Railway Company, 48 Wisconsin, Page 513.

Also Cleveland, Columbus, etc., Railway Company vs. Newell, 104 Ind., Page 265.

They are admissible even after the commencement of the action.

Matteson vs. New York Central Railroad Company, 35th N. Y., Page 487. 67 Barb., Page 364 and authorities cited.

Therefore it would seem that the evidence of the witness to which objection is made, even if such objections had been made at the proper time and been so specific as to bring the question here for review, is entirely competent and should have gone to the jury as a whole, for what it was worth.

The second error assigned undertakes to present for review the question as to the correctness of the court's charges to the jury.

Specification (A) under said assignment does not refer to or point out the language employed by the court to which objection is made, hence it can present no question.

See 5th Div. rule 21, as amended on 6th May, 1872, 14 Wall. Page 12.

Specification (B) under said assignment points out the following language: "This evidence was not disputed by defendant and it is not claimed that when the berth fell the plaintiff was where she had no right to be, or that by her own negligence she contributed to her injury.".

This language was used by the court, as claimed by appellant's counsel after the court had stated to the jury what a certain witness had testified.

We think the court may in all cases, whilst charging the jury say to them, that certain points before them are not in dispute, and that certain other propositions are being controverted and that in the doing of which the court does not encroach or infringe upon the rights of the jury.

Specification (C) under said assignment raises the question as to whether the court could properly say to the jury, in the absence of

any contradiction of the fact, that it might be assumed that the plaintiff "was quietly in her seat" at the time she received the injury.

For the reason given above, we think the court had the right to make said statement to the jury and that such right continues so long as there was absolutely no evidence, as was the case, here contradicting said proposition, announced by the court to the jury that at the time she was injured she was "quietly in her seat."

It is the province of the jury to pass upon the weight of evidence. *Whether there be evidence on any particular point, is a question for the judge.*

Chandler vs. Otto Von Roeder et al. 24 Howard P. 224.

Specification (D) in said assignment does not present any question, in that it does not comply with the rule above referred to in setting out *totidem vrbis* that to which objection is made, or even any part of the words employed by the court in their charges. We might say, however in regard to this specification that that the reading of all the charges of the court will not impress a fair mind to the effect the same indicates, even even remotely, that the court who presided at the trial below, believed the plaintiff ought to recover, or that they, in any sense, indicated such belief to the jury in their charges.

The assumption made by counsel in this specification is unjust and unfair to the trial court who so impartially sits in judgment in all cases as does the distinguished jurist, Judge Gresham.

By agreement between counsel for appellee, the first error assigned by appellant, that is the action of the court in refusing appellant the right to have its medical witnesses make a physical examination of the appellee before the trial of the cause, will be discussed by Mr. Harris. And we have no doubt but what his discussion will be full and complete on that question. And for any information the court may desire concerning said question they will, no doubt, find the same in the separate brief filed by Mr. Harris.

We feel that our work is done so far as the discussion of the other errors assigned are concerned, and therefore respectfully submit this brief for the consideration of the court.

Hoping that the cause may be in all things affirmed and the appellant thereby be compelled to pay the plaintiff the damages she has suffered because of its gross negligence and carelessness.

Respectfully submitted,

JAMES A. NEW,

Of Counsel for Appellee.

Addison C. Harris

Of Counsel.